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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION and
JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants

v.

THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JOINT APPENDIX

JURISDICTIONAL STATEMENT DOCKETED APRIL 17, 1981
PROBABLE JURISDICTION NOTED JUNE 15, 1981

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 24, 1979 Plaintiffs' Complaint filed.

May 7, 1979 Plaintiffs' Amended Complaint filed.

June 25, 1979 Intervenor Mississippi Power & Light Company's Complaint filed.

June 29, 1979 Answer of Defendant Federal Energy Regulatory Commission filed; Answer of Defendant Secretary of Energy filed.

August 24, 1979 Answer of Defendant Federal Energy Regulatory Commission to Intervenor Mississippi Power & Light Company's Complaint filed.

August 27, 1979 Answer of Defendant Secretary of Energy to Intervenor Mississippi Power & Light Company's Complaint filed.

September 27, 1979 Response to Intervenor Mississippi Power & Light Company's First Set of Interrogatories to Defendant Secretary of Energy filed.

December 26, 1979 Response to Intervenor Mississippi Power & Light Company's First Set of Interrogatories to Defendant Federal Energy Regulatory Commission filed.

May 8, 1980 Plaintiffs' Motion for Summary Judgment filed.

May 12, 1980 Intervenor Mississippi Power & Light Company's Motion for Summary Judgment filed.

May 14, 1980 Amended Response to Mississippi Power & Light Company's First Set of Interrogatories to Defendant Secretary of Energy filed.

June 18, 1980 Defendant Secretary of Energy's Motion for Judgment on the Pleadings or in the Alternative for Summary Judgment filed.

June 27, 1980 Defendant Federal Energy Regulatory Commission's Motion to Dismiss and for Summary Judgment filed.

February 20, 1981 Summary Judgment entered for Plaintiffs.

February 27, 1981 "Final Judgment" entered.

March 13, 1981 Notice of Appeal to the Supreme Court of the United States filed by Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0212(C)

THE STATE OF MISSISSIPPI, PLAINTIFFS

v.

FEDERAL ENERGY REGULATORY COMMISSION and JAMES R. SCHLESINGER, Secretary of Energy, DEFENDANTS

PLAINTIFFS' AMENDED COMPLAINT

The State of Mississippi, by and through the Honorable A. F. Summer, Attorney General of the State of Mississippi, and the Mississippi Public Service Commission, D. W. Snyder, Chairman, Norman A. Johnson, Jr., Vice Chairman, and John L. Dale, being all three of its Commissioners, by and through A. F. Summer, Attorney General of the State of Mississippi [all herein sometimes referred to collectively as the "plaintiffs"], bring this action seeking a declaratory judgment and further relief against the Federal Energy Regulatory Commission [hereinafter sometimes referred to as "FERC"] and James R. Schlesinger, Secretary of Energy, [both hereinafter sometimes referred to as "Defendants"].

I.

JURISDICTION AND DECLARATORY RELIEF

1. The instant action is a civil action against an agency and official of the United States, and arises under

the Constitution and laws of the United States. Jurisdiction for this action rests with this Court under the provisions of 28 U.S.C. § 1331.

2. This is a proceeding for a declaratory judgment and for further relief under 28 U.S.C. §§ 2201-02 for the purpose of determining a question in actual controversy between the parties hereto.

II.

VENUE

Venue is proper within the instant division and judicial district pursuant to the provisions of 28 U.S.C. § 1391.

III.

PARTIES

1. Plaintiff State of Mississippi is a sovereign state which was admitted into the Union on December 10, 1817. Plaintiff State of Mississippi brings the instant action by and through A. F. Summer, its Attorney General, pursuant to *Miss. Code Ann.* (1972) §§ 25-31-19, 7-5-39, 77-1-43 and 7-5-51, together with Article VI, Section 173, of the *Mississippi Constitution* and the common law. The said A. F. Summer is an adult resident citizen of the Jackson Division of the Southern District of Mississippi, residing at 4511 Forest Park Drive, Jackson, Mississippi.

2. Plaintiff Mississippi Public Service Commission is an administrative agency of the State of Mississippi, organized pursuant to Article VII, Section 186, of the *Mississippi Constitution*, and vested with exclusive original jurisdiction over the intrastate business and property of public utilities (including electric and gas utilities) charged with the duty to regulate the rates thereof and with enforcing the laws of Mississippi in that regard. Chapter 372, Mississippi Laws of 1956, as Amended; *Miss. Code Ann.* (1972) §§ 77-3-5 and 77-1-43; see, also,

Miss. Code Ann. (1972) § 7-9-1 (as to common carriers), and Article VII, Section 186, *Mississippi Constitution.*

3. All plaintiffs herein are directly subject to the terms and provisions of Public Law 95-617, the Public Utility Regulatory Policies Act enacted by the Ninety-Fifth Congress, Second Session, and approved by the President on the 9th day of November, 1978 [hereinafter sometimes referred to as "PURPA"].

4. The Defendant Federal Energy Regulatory Commission [FERC] is a federal agency created and established pursuant to the provisions of 42 U.S.C. § 7134, and is the federal agency charged with implementing, administering and enforcing provisions of P.L. 95-617, PURPA.

5. The Defendant James R. Schlesinger is sued as Secretary of Energy, in his official capacity as an Officer of the United States and the Chief Executive Officer of the Department of Energy established pursuant to the provisions of P.L. 95-91 of the Ninety-Fifth Congress, 91 Stat. 565, 42 U.S.C. § 7101, and charged with implementing, administering and enforcing the provisions of P.L. 95-617, PURPA.

IV.

THE CONTROVERSY

1. The Public Utility Regulatory Policies Act of 1978, P.L. 95-617, enacted by the Ninety-Fifth Congress, Second Session, and approved by the President on the 9th day of November, 1978, sets forth a vast and complex federal regulatory policy to establish a series of federal policy "standards", both substantive and procedural, respecting intrastate utility regulation and the retail utility rates of the people of the State of Mississippi and the nation.

2. PURPA directly affects the retail electric and gas rates of the people of the State of Mississippi which have been traditionally subject to primary regulation by the Mississippi Public Service Commission and the State of

Mississippi, and it places myriad and expensive federal responsibilities on the Mississippi Public Service Commission in the exercise of its lawful duties and responsibilities under the statutes and Constitution of the State of Mississippi and on some utilities within the State of Mississippi which are not otherwise regulated by the Mississippi Public Service Commission.

3. Title I [Sections 111, 113, 114 and 115] of the Public Utility Regulatory Policies Act establishes eleven federal standards (one set as to rate making and the other as to the terms and conditions of service) for retail electric utilities and mandates that the Mississippi Public Service Commission and certain nonregulated electric utilities shall consider these standards and formally determine, in writing, after a hearing, "whether or not it is appropriate to implement such standards to carry out the purposes of the [Public Utility Regulatory Policies] Act", and the Commission is specifically required to make a separate determination regarding each standard with respect to each utility under its jurisdiction, either in a rate case or in a generic hearing.

4. Title III [Sections 303 and 304] of PURPA establishes federal standards for retail gas utilities and makes requirements for consideration by the Mississippi Public Service Commission similar to those required as to electric utilities.

5. Section 115 of Title I and Section 304 of Title III of PURPA establishes rules and methods which govern the consideration and determination by the Mississippi Public Service Commission of these federal standards.

6. Although the Plaintiffs may decline to implement said federal standards after considering same, the Mississippi Public Service Commission must follow the procedural standards and requirements established by PURPA which supplement its procedures and which override the laws of Mississippi and procedures of the Mississippi Public Service Commission to the extent of any conflict between such federal purposes and the pro-

cedures of the Mississippi Public Service Commission. [Section 111(b)(2) and 303 of PURPA].

7. PURPA additionally purports to require the State of Mississippi, by and through the Mississippi Public Service Commission, to assist in implementing and enforcing provisions of PURPA, and the Secretary of Energy has already formally notified the Mississippi Public Service Commission of his "requirement that by January 29, 1979, state regulatory authorities report to the Secretary of Energy as to their rate-making authority over listed utilities."

8. In addition, PURPA [Section 121] authorizes the Secretary of Energy, any affected electric utility or any electric consumer of an affected electric utility to intervene and to participate as of right in rate-making procedures of the Mississippi Public Service Commission and authorizes the Secretary of Energy to intervene as an *amicus curiae* in appellate proceedings in Mississippi courts involving such federal standards, and creates a federal cause of action for intervenors in such proceedings under certain circumstances, to recover their attorneys' fees and costs; and PURPA [Section 305] authorizes the Secretary of Energy to intervene and to participate as of right in rate-making procedures as to gas utilities before the Mississippi Public Service Commission.

9. PURPA [Section 309 and 116] requires and compels the Mississippi Public Service Commission to make annual reports to the Secretary of Energy for ten (10) years "in such manner as the Secretary shall prescribe," respecting its consideration of the federal standards.

10. The Public Utility Regulatory Policies Act, if allowed to be enforced, will gravely delay and interfere with the performance by the Mississippi Public Service Commission of its lawful duties to the people of the State of Mississippi, especially because said federal legislation does not take into consideration the time and personnel needed to consider and carry out this legislation.

11. The Defendants' threatened enforcement of these provisions will cause immediate and irreparable harm to the plaintiffs, as hereinafter set forth. The Plaintiffs herein, as is more specifically hereinafter set forth, jointly and severally challenge these provisions as being unconstitutional on the grounds set forth hereinafter.

V

THE HARM

1. Plaintiffs state that the above-described provisions of the Public Utility Regulatory Policies Act of 1978, if enforced, would seriously and irrevocably harm the plaintiffs in the following respects:

a. Enforcement requires the State of Mississippi, acting through the Mississippi Public Service Commission, in effect, to show cause why federal regulatory standards should not be adopted in contravention of the sovereign right of the State of Mississippi, acting through its Mississippi Public Service Commission, to exercise its own policies and jurisdiction as to retail electric and gas rates.

b. Enforcement coerces the plaintiffs to employ a substantial number of additional employees and to spend a substantial amount of state funds in order to implement federal policies which the plaintiffs did not choose.

c. Enforcement forces upon the sovereign State of Mississippi these federal policies as to how the essential decisions regarding the conduct of utility rate making and integral governmental functions in regard thereto are to be made and will impair the ability of the State of Mississippi and the other states to function effectively within the federal system.

d. Enforcement will vastly complicate and delay the activities of the Mississippi Public Service Commission in performing its duties of establishing retail electric and gas rates for the people of the State of Mississippi.

e. Enforcement will cost the electric and gas consumers of Mississippi a tremendous amount of money to pay for the implementation of these federal policies and the expensive bureaucratic procedures required for this purpose.

f. Enforcement will disrupt the ability of the Mississippi Public Service Commission to pay its expenses out of the utility tax allocated for that purpose, compelling the Plaintiffs to rely on voluntary grants from the United States for this purpose which may be suspended at any time and which may be used for purposes of coercion.

2. Plaintiffs allege that enforcement of the Public Utility Regulatory Policies Act is an immediate threat because the Federal Energy Regulatory Commission has already begun enforcement thereof and is publishing proposed rules on cost of service reporting and on grants.

COUNT ONE

Plaintiffs allege that PURPA's attempt to coerce the plaintiffs into adopting federal standards on rate making, employing state employees and expending substantial state funds to assist the Defendant in enforcing the federal policies therein set forth and its attempt to dictate to the Plaintiffs who shall be parties to regulatory proceedings of the State of Mississippi and the Mississippi Public Service Commission are an invasion of state sovereignty and intergovernmental immunity, violative of the Tenth Amendment to the United States Constitution and violative of the constitutional guarantee of a republican form of government as set forth in Article IV, Section 4, of the *United States Constitution.*

COUNT TWO

Plaintiffs allege that the power of Congress to regulate "commence among the several states" under Article I, Section 8, Clause 3, of the *United States Constitution* does not authorize the Congress to regulate the sovereign State of Mississippi and the Mississippi Public Service Commission in their regulation of retail utilities exclusively within the State of Mississippi.

COUNT THREE

Plaintiffs allege that PURPA places an intolerable burden of time and money on performance by the State of Mississippi and its Mississippi Public Service Commission of their utility ratemaking function in violation of the Tenth Amendment and Article IV, Section 4, of the *United States Constitution*, especially by requiring consideration of extremely complex federal regulatory policies as a part of every rate case under federal procedural rules which repeal any conflicting procedural rules of the State of Mississippi and its Mississippi Public Service Commission.

COUNT FOUR

Plaintiffs allege that the Public Utility Regulatory Policies Act violates Article VI, Section 2, of the *United States Constitution* (providing that laws made pursuant to the *United States Constittuion* shall be the "supreme law of the land") and the Tenth Amendment of the *United States Constitution* by providing in Section III (a) and Section 303(a) that "for purposes of [considering whether to adopt the federal standards] * * * and for purposes of any review of such consideration and determination in any court * * * [in accordance with Section 123 or Section 307], the purposes of this Title supplement otherwise applicable state law"; since Congress may not pass a "state law" and a "state law"; may not be part of the "supreme law of the land" and yet the

legislature of the State of Mississippi might not be able to repeal or amend this "supplementary" state law.

COUNT FIVE

Plaintiffs allege that the Tenth Amendment and Article IV, Section 4, of the *United States Constitution* are violated by that provision of the Public Utility Regulatory Policies Act which allows the Secretary of Energy and third parties to intervene in rate-making proceedings which are solely within the sovereign power and jurisdiction of the State of Mississippi and the Mississippi Public Service Commission, and which allow the Secretary of Energy to intervene in appellate proceedings in the Court of Mississippi as an *amicus curiae* in violation of the separation of powers and the exclusive judicial power to determine who shall be allowed thus to appeal.

Plaintiffs allege that the Public Utility Regulatory Policies Act and the activities of the Defendants enforcing the same are an intrusion into Mississippi's sovereign right as a State to establish its own rate-making utility policies and the administrative and judicial procedures for enforcing same, compelling the people of Mississippi to surrender control over its police power to another sovereign to carry out federal policies chosen by the congress, not by the Legislature of Mississippi, and vesting ultimate control in the Supreme Court of the United States.

COUNT SIX

Plaintiffs allege that the Tenth Amendment and Article IV, Section 4, of the *United States Constitution* are violated by Section 210 of Title II of PURPA requiring the Plaintiffs to follow rules which FERC is to prescribe within one year after the enactment of PURPA as to cogeneration and small power production, under the penalty therein [Section 210(h)] prescribed.

VI.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Honorable Court will:

1. Declare that the Public Utility Regulatory Policies Act of 1978 is void and unconstitutional.
2. Declare that the provisions of the Public Utility Regulatory Policies Act which attempt to coerce the Plaintiffs into adopting federal policies, employing and assigning state employees and expanding substantial amounts of state funds to assist Defendants in implementing the federal policies contained in the Public Utility Regulatory Policies Act are unconstitutional and void.
3. Declare that those provisions of the Public Utility Regulatory Policies Act pertaining to substantive and procedural federal standards and the three federal purposes supplementing state law to be unconstitutional and void.
4. Award Plaintiffs their costs.
5. Award Plaintiff's attorneys' fees.
6. Grant such other, further and general relief as this Court may deem proper.
7. That this Court expedite this action on the docket of the Court for speedy disposition and adjudication of the rights of the Plaintiffs.

Respectfully submitted

STATE OF MISSISSIPPI
and
MISSISSIPPI PUBLIC SERVICE COMMISSION
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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

No. J79-0212(C)

THE STATE OF MISSISSIPPI, by and through A. F. SUMMER, Attorney General of the State of Mississippi; and MISSISSIPPI PUBLIC SERVICE COMMISSION, D. W. SNYDER, Chairman, NORMAN A. JOHNSON, JR., Vice Chairman, and JOHN L. DALE, as Commissioners thereof, acting by and through A. F. SUMMER, Attorney General of the State of Mississippi, PLAINTIFFS

vs.

FEDERAL ENERGY REGULATORY COMMISSION and JAMES R. SCHLESINGER, Secretary of Energy, DEFENDANTS

MISSISSIPPI POWER & LIGHT COMPANY, INTERVENOR

INTERVENOR'S COMPLAINT

Mississippi Power & Light Company, Intervenor, intervenes in this action seeking a declaratory judgment against the Federal Energy Regulatory Commission and James R. Schlesinger, Secretary of the Department of Energy, hereinafter sometimes referred to as the "Defendants".

I.

JURISDICTION AND DECLARATORY RELIEF

1. The instant intervention is in a civil action against an agency of the United States, and arises under the Constitution and laws of the United States. Jurisdiction for this action rests with this Court under the

provisions of 28 *U.S.C.* Section 1331 and also 5 *U.S.C.* Section 702 and 703.

2. This is a proceeding for declaratory judgment under 28 *U.S.C.* Section 2201 and Section 2202 for the purpose of determining a question in actual controversy between the Intervenor and the parties hereto.

II.

VENUE

Venue is proper within the instant division and judicial district pursuant to provisions of 28 *U.S.C.* Section 1391.

III.

PARTIES

Intervenor adopts and reiterates by reference the allegations of Paragraph III, Sub-paragraphs 1, 2, 3, 4 and 5 of Plaintiff's Amended Complaint and would show in addition:

6. Intervenor, Mississippi Power & Light Company, is a Mississippi corporation providing intrastate retail electric service to its customers in the western half of the State of Mississippi; it is an electric utility assumed to be included and covered by the Public Utility Regulatory Policies Act of 1978, (Publ. L. 95-617, 92 Stat. 3119, 16 *U.S.C.* Section 2601 through 2645, hereinafter sometimes referred to as "PURPA") since its total sales of electricity for purposes other than resale have exceeded five hundred million kilowatt hours during every calendar year beginning after December 31, 1975 and before the immediately preceding calendar year.

IV.

THE CONTROVERSY

Intervenor adopts and incorporates by reference, Par. IV, Sub-sections 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Plaintiffs' Amended Complaint and would show in addition:

11. The Defendants' threatened enforcement of these provisions will cause immediate and irreparable harm both to the Plaintiffs and to the Intervenor, as hereinafter set forth. The Intervenor joins the Plaintiffs in jointly and severally challenging the provisions of PURPA as being unconstitutional on the grounds hereinafter set forth.

12. Intervenor would show that PURPA and the enforcement thereof by said Defendants will seriously aggravate the problem of regulatory lag in the fixation of its rates by the Mississippi Public Service Commission, seriously obstructing and delaying decision therein pending prolonged and complex litigation to ascertain the appropriateness of the Federal regulatory standards.

13. PURPA, especially 16 U.S.C. Section 2643, wrongfully and unconstitutionally imposes upon Intervenor the vast cost of obtaining very complex and extensive information as to the cost of service and of breaking the same down into customer cost component, demand cost component and energy cost component; and PURPA requires that, not later than two (2) years after November 9, 1978, Intervenor shall file with the Federal Energy Regulatory Commission and the Mississippi Public Service Commission this information in accordance with the rules, methods, procedure and format prescribed by the Federal Energy Regulatory Commission unless the Federal Energy Regulatory Commission finds, after public notice and opportunity for the presentation of written arguments, that gathering such information is not likely to carry out the purposes of said Section 2643. Any violation of the requirements of said Section 2643 shall be treated as a violation of a provision of the Energy Supply and Environmental Coordination Act of 1974 (15 *U.S.C.* Section 797). The information thus required to be filed by Intervenor is essential for the enforcement of the other provisions of PURPA.

14. PURPA (especially 16 *U.S.C.* Sections 2631-2633) wrongfully seeks to impose upon Intervenor liability for

the cost of enforcing PURPA and of intervention and participation in proceedings for the enforcement thereof by the Defendant and others, contrary to the laws and *Constitution of the State of Mississippi.*

V.

THE HARM

Intervenor adopts and integrates by reference Subsections 1 and 2 and Counts One through Six of Paragraph V of Plaintiffs' Amended Complaint and would show in addition as follows:

COUNT SEVEN

Intervenor alleges that PURPA and the activities of the Defendants in enforcing same are unconstitutional for the reasons set forth in Paragraph V of the Plaintiffs' Amended Complaint and that the direct cost of the unconstitutional enforcement of PURPA by the Defendants will be placed wrongly upon the Intervenor and its customers pursuant to Section 77-3-87, *Mississippi Code of 1972, Annotated*; and therefore, Intervenor alleges that PURPA violates the due process clause of the Fifth and Fourteenth Amendments, Article I, Section 8, Clause 3 ("The Commerce Clause"), Article IV, Section 4 (the "Republican form of Government"), Article VI, Section 2 (the "Supreme Law of the Land"), and the Tenth Amendment of the *United States Constitution.*

VI.

PRAYER FOR RELIEF

WHEREFORE, Intervenor prays that this Honorable Court will:

1. Declare that the Public Utility Regulatory Policies Act of 1978 is void and unconstitutional.

2. Declare that the provisions of the Public Utility Regulatory Policies Act which attempt to coerce the

Plaintiffs, at the expense of this Intervenor, into adopting federal policies, employing and assigning State employees and expending substantial amounts of State funds to assist Defendants in implementing the federal policies contained in the Public Utility Regulatory Policies Act are unconstitutional and void.

3. Declare that those provisions of the Public Utility Regulatory Policies Act (16 *U.S.C.* Section 2643) requiring Intervenor, under penalty of law, to periodically gather and file expensive information to be unconstitutional and void.

4. Declare those provisions of the Public Utility Regulatory Policies Act (16 U.S.C. Section 2631-2633) authorizing intervention in Intervenor's rate proceedings and making Intervenor liable for the costs of such intervention by the Defendants and other parties to be unconstitutional and void.

5. Award Intervenor its costs.

6. Award Intervenor Attorneys' fees.

7. Grant such other, further and general relief as this Court may deem proper.

/s/ James K. Child
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/s/ Joshua Green
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Civil Action No. J79-0212(C)

THE STATE OF MISSISSIPPI, ET AL., PLAINTIFFS

v.

FEDERAL ENERGY REGULATORY COMMISSION, and
JAMES R. SCHLESINGER, Secretary of Energy,
DEFENDANTS

ANSWER OF DEFENDANT JAMES R. SCHLESINGER, SECRETARY OF ENERGY

Defendant, James R. Schlesinger, Secretary of Energy, through his undersigned attorneys, answer Plaintiffs' Amended Complaint as follows:

FIRST DEFENSE

Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Defendant James R. Schlesinger, Secretary of Energy, answers the numbered paragraphs of the amended complaint as follows:

The introductory paragraph of the amended complaint is a characterization of plaintiffs' case to which no response is required.

I.

1. The first sentence of this paragraph is a characterization of plaintiffs' case to which no response is required. The allegations of the second sentence contain conclusions of law to which no response is required, but insofar as an answer may be deemed required, they are denied.

2. This paragraph is a characterization of plaintiffs' case to which no response is required.

II.

The allegations of this paragraph are conclusions of law to which no response is required, but insofar as an answer may be deemed required, they are denied.

III.

1. The allegations of the first sentence of this paragraph are admitted. The allegations of the second sentence are admitted only to the extent that they are consistent with the constitutional and statutory provisions cited therein, and with the common law. Defendant Schlesinger lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of this paragraph.

2-3. The allegations of these paragraphs are denied, except to the extent that they are consistent with the provisions of the statutes cited therein.

4. The allegations of this paragraph are denied, except to admit that the defendant Federal Energy Regulatory Commission (FERC) is a federal agency created and established pursuant to the provisions of 42 U.S.C. § 7134, and is the federal agency charged with implementing, administering and enforcing some of the provisions of P.L. 95-617, PURPA.

5. The allegations of this paragraph concerning the manner in which the defendant James R. Schlesinger is sued are a characterization of plaintiffs' complaint as to

which no response is required. The remaining allegations of this paragraph are denied, except to admit that defendant Schlesinger, who is the Chief Executive Officer of the Department of Energy, which was established pursuant to provisions of the Department of Energy Organization Act, P.L. 95-91, 42 U.S.C. § 7101 *et seq.*, is charged with implementing, administering and enforcing some of the provisions of P. L. 95-617, PURPA.

IV.

1-6. The allegations of these paragraphs are denied, except to the extent that they are consistent with the provisions of the Public Utility Regulatory Policies Act ("PURPA").

7. The allegations of this paragraph concerning the requirements of PURPA are denied except to the extent that they are consistent with the provisions of that Act. The allegations concerning the actions already taken by the Secretary of Energy are denied as phrased. Defendant Schlesinger affirmatively alleges that Sections 102(c) and 301(d) of PURPA require the Secretary of Energy to publish lists identifying the electric and gas utilities subject to Titles I and III of that Act. Pursuant to these Sections, on December 22, 1978, the Economic Regulatory Administration of the Department of Energy published a Notice in the Federal Register, which included the required lists of utilities, and provided that "No later than January 29, 1979, each State regulatory authority must notify the Department of Energy of each utility on the list over which it has ratemaking authority." (43 Fed. Reg. 59883, Dec. 22, 1978).

8-9. The allegations of these paragraphs are denied except to the extent that they are consistent with the provisions of PURPA cited therein.

10. Denied.

11. The allegations of the first sentence of this paragraph are denied. The allegations of the second sentence are a characterization of plaintiffs' complaint as to which no response is required.

V.

1. Denied.

2. The allegations of this paragraph are denied except to admit on information and belief that the Federal Energy Regulatory Commission has published rules on cost of service reporting.

The allegations of Count One through Six are denied.

All allegations which are not specifically admitted are denied.

WHEREFORE having fully answered, defendant Schlesinger prays that this action be dismissed and that the Court grant such other and further relief as may be appropriate.

Respectfully submitted,

BARBARA ALLEN BABCOCK
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. J79-0212(C)

THE STATE OF MISSISSIPPI AND THE
MISSISSIPPI PUBLIC SERVICE COMMISSION,
PLAINTIFFS

v.

FEDERAL ENERGY REGULATORY COMMISSION and
JAMES R. SCHLESINGER, DEFENDANTS

ANSWER OF THE FEDERAL ENERGY REGULATORY COMMISSION

The Federal Energy Regulatory Commission for its answer to the Amended Complaint of the State of Mississippi and the Mississippi Public Service Commission alleges as follows:

1. The allegations in Section I of the complaint, to the extent that they are not merely characterizations of the complaint, are denied.
2. The allegation in Section II of the complaint is admitted.
3. The Commission admits the allegations of the first sentence of paragraph 1, Section III of the complaint, and admits the allegation of the second sentence of that paragraph that the action was brought by and through A. F. Summer. It admits that A. F. Summer's authority to institute action to the extent the allegation made is consistent with the authority cited therein. In all remaining respects, the allegations of paragraph I of Section III are denied for lack of knowledge or information sufficient to form a belief.

4. The Commission admits the allegations of paragraph 2 of Section III to the extent those allegations are consistent with the statutory provisions cited and otherwise denies them.

5. The Commission admits that the Public Utility Regulatory Policies Act (PURPA), Public Law 95-617, was enacted by the 95th Congress, 2d Session, and was approved by the President on November 9, 1978. The remaining allegations of paragraph 3 of Section III are admitted to the extent consistent with the terms of that statute and are otherwise denied.

6. The Commission admits the allegations of paragraph 4 of Section III dealing with the creation and establishment of the Commission and admits it is charged with implementing, administering and enforcing certain provisions of P.L. 95-617. The Commission denies it is charged with implementing, administering and enforcing all of the provisions of PURPA.

7. In response to the allegations of paragraph 5 of Section III, the Commission admits that the Secretary of Energy is charged with implementing, administering and enforcing some of the provisions of PURPA, but denies he is so charged with respect to all of PURPA's provisions. The remaining allegations of that paragraph are a characterization of the case to which no responsive pleading is required.

8. The allegations of paragraphs 1 through 9 of Section IV are denied except to the extent they are consistent with the provisions of the statute described therein. The Commission denies the assertion in paragraph 7 concerning notifications given by the Secretary of Energy to the Mississippi Public Service Commission for lack of knowledge or information sufficient to form a belief as to its accuracy.

9. The allegations of paragraph 10 of Section IV are denied.

10. The Commission denies the allegations of the first sentence of paragraph 11, Section IV. The allegations of the second sentence of that paragraph are a charac-

terization of the case to which no responsive pleading is required.

11. The Commission denies the allegations of paragraph 1 of Section V of the complaint.

12. The Commission admits the allegations in paragraph 2 of Section V that it has published rules on cost of service reporting. The Commission denies the remaining allegations of that paragraph.

13. The Commission denies each and every allegation of Count One.

14. The Commission denies each and every allegation of Count Two.

15. The Commission denies each and every allegation of Count Three.

16. The Commission denies each and every allegation of Count Four.

17. The Commission denies each and every allegation of Count Five.

18. The Commission denies each and every allegation of Count Six.

19. Any allegation not specifically admitted to which an answer is deemed necessary is denied.

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted against the Commission.

SECOND DEFENSE

There is no justiciable case or controversy between the plaintiffs and the Commission.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Civil Action No. J79-0212(C)

THE STATE OF MISSISSIPPI, ET AL., PLAINTIFFS

v.

FEDERAL ENERGY REGULATORY COMMISSION and
JAMES R. SCHLESINGER, DEFENDANTS

ANSWER OF THE FEDERAL ENERGY REGULATORY COMMISSION TO THE COMPLAINT OF THE INTERVENOR

The Federal Regulatory Commission for its answer to the complaint of intervenor Mississippi Power & Light Company alleges as follows:

1. The allegations of Section I of the intervenor's complaint, to the extent they are not mere characterizations of the case, are denied.
2. The allegation of Section II of the intervenor's complaint is admitted.
3. Section III of its complaint the intervenor adopts as paragraphs 1-5, similarly numbered portions of the plaintiffs' amended complaint. The Commission, as its answer to those allegations of the intervenor's complaint reiterates and incorporates by reference its responses to the allegations set forth in its answer to the plaintiff's amended complaint.
4. The Commission admits the allegation of paragraph 6 of Section III of the intervenor's complaint except those referring to the intervenor's assumption concerning its

conclusions under PURPA. In response to the latter, the Commission admits that the intervenor is on the final list of electric utilities which are covered by PURPA. See 44 Fed Reg. 17448 (March 21, 1979).

5. The intervenor, as paragraphs 1-10 of Section IV of its complaint, incorporates the similarly numbered paragraphs of the plaintiffs' amended complaint. The Commission, as its answer to those allegations of the intervenor's complaint, reiterates and incorporates by reference the answers it gave to the same paragraphs of plaintiffs' amended complaint.

6. The allegation of the first sentence of paragraph 11 of the intervenor's complaint is denied. The second sentence is merely a characterization of the claim, to which no responsive pleading is required, but to the extent a response is deemed necessary, the matter is denied.

7. The allegation of paragraph 12 is denied.

8. The Commission denies the allegation of the first sentence of paragraph 13 of the intervenor's complaint that PURPA wrongfully and unconstitutionally imposes on the intervenor the cost of obtaining information as to its cost of service, and related data. The description of PURPA set forth in the second part of the first sentence and in the second sentence of paragraph 13 is admitted to the extent it is consistent with the terms of Section 133 of PURPA, 16 U.S.C. § 2643, and is otherwise denied. The allegation of the final sentence of paragraph 13 is denied.

9. The allegation of paragraph 14 is denied.

10. The intervenor at the beginning of Section I of its complaint incorporates Counts One through Six of the plaintiffs' amended complaint. The Commission, as its answer to those allegations of the intervenor's complaint, incorporates by reference its answers to Counts One through Six of the plaintiffs' amended complaint.

11. Each and every allegation of Count Seven of the intervenor's complaint is denied.

12. Section VI is the intervenor's prayer for relief, to which no answer is required.

13. Any allegation not specifically admitted to which an answer is deemed necessary is denied.

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

There is no justiciable case or controversy between the intervenor and the Commission as to certain of the claims raised in the complaint.

THIRD DEFENSE

The intervenor lacks standing to litigate certain of the claims raised in its complaint.

Respectfully submitted,

HOWARD E. SHAPIRO
Solicitor

JOANNE LEVEQUE
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426
202-275-4258
August 20, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

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FEDERAL ENEGRY REGULATORY COMMISSION, and
JAMES R. SCHLESINGER, Secretary of Energy,
DEFENDANTS

ANSWER OF DEFENDANT JAMES R. SCHLESINGER, SECRETARY OF ENERGY TO MISSISSIPPI POWER & LIGHT COMPANY'S COMPLAINT IN INTERVENTION

Defendant, James R. Schlesinger, Secretary of Energy, through his undersigned attorneys, answers Mississippi Power and Light Company's (MP&L) complaint in intervention as follows:

FIRST DEFENSE

MP&L's complaint in intervention fails to state a claim upon which relief may be granted.

SECOND DEFENSE

MP&L lacks standing to litigate certain of the claims raised in its complaint.

THIRD DEFENSE

Defendant James R. Schlesinger answers the numbered paragraphs of MP&L's complaint in intervention as follows:

The introductory paragraph is a characterization of MP&L's case to which no response is required.

I.

1. The first sentence of this paragraph is a characterization of MP&L's case to which no response is required. The allegations of the second sentence contain conclusions of law to which no response is required, but insofar as an answer may be deemed required, they are denied.

2. This paragraph is a characterization of MP&L's case to which no response is required, but insofar as an answer may be deemed required, denied.

II.

The allegations of this paragraph contain conclusions of law to which no response is required, but insofar as an answer may be deemed required, they are denied.

III.

In answer to MP&L's adoption of the allegations in Paragraph III, Sub-paragraphs 1, 2, 3, 4, and 5 of Plaintiffs' Amended Complaint, Secretary Schlesinger reiterates, and incorporates by reference, his response to these allegations set forth in his Answer to Plaintiffs' Amended Complaint.

6. Secretary Schlesinger lacks knowledge and information sufficient to form a belief as to the truth of the allegations in this paragraph, except to admit that MP&L is on the final list of electric utilities which are covered by the Public Utility Regulatory Policies Act of 1978. *See* 44 Fed. Reg. 17448 (March 21, 1979).

IV.

In answer to MP&L's adoption of the allegations in Paragraph IV, Sub-paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of Plaintiffs' Amended Complaint, Secretary Schlesinger reiterates, and incorporates by reference, his response

to these allegations set forth in his Answer to Plaintiffs' Amended Complaint.

11. The allegations of the first sentence of this paragraph are denied. The allegations of the second sentence are a characterization of MP&L's complaint to which no response is required.

12. Denied.

13. The allegation in the first sentence of this paragraph that the Public Utility Regulatory Policies Act (PURPA) wrongfully and unconstitutionally imposes on MP&L the cost of obtaining information as to its cost of service is denied. The remaining allegations of the first sentence and those contained in the second sentence are denied except to the extent they are consistent with PURPA, and the Court is respectfully referred to the provisions of the Act for the terms thereof. The allegations of the third sentence are denied.

14. Denied.

V.

In answer to MP&L's adoption of the allegations in Subsections 1 and 2 and Counts One through Six of Paragraph V of Plaintiffs' Amended Complaint, Secretary Schlesinger reiterates, and incorporates by reference, his response to these allegations set forth in his Answer to Plaintiffs' Amended Complaint.

The allegations of Count Seven are denied.

All allegations of the complaint in intervention which are not specifically admitted herein are hereby denied.

Wherefore having fully answered, defendant Schlesinger prays that this action be dismissed and that the Court grant such other relief as may be appropriate.

Respectfully submitted,

STUART E. SCHIFFER
Acting Assistant Attorney General
Civil Division

ROBERT E. HAUBERG
United States Attorney

L. A. SMITH, III
Assistant United States Attorney

/s/ C. Max Vassanelli
C. MAX VASSANELLI

/s/ Paul Gaukler
PAUL GAUKLER

/s/ Dina R. Lassow
DINA R. LASSOW
Attorneys, Department of Justice
Washington, D.C. 20530
Attorneys for Defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

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THE STATE OF MISSISSIPPI, ET AL., PLAINTIFFS

and

MISSISSIPPI POWER & LIGHT COMPANY,
PLAINTIFF-INTERVENOR

v.

FEDERAL ENERGY REGULATORY COMMISSION, and
CHARLES W. DUNCAN, JR., Secretary of Energy,
DEFENDANTS

RESPONSE TO MISSISSIPPI POWER & LIGHT COMPANY'S FIRST SET OF INTERROGATORIES TO CHARLES W. DUNCAN, JR., SECRETARY OF ENERGY

GENERAL OBJECTIONS

Defendant Charles W. Duncan, Jr., Secretary of Energy, objects to plaintiff-intervenor Mississippi Power and Light Company's First Set of Interrogatories as seeking information which is completely irrelevant to the issues to be decided in this case, and because plaintiff-intervenor has no standing to allege that a federal statute violates state sovereignty.

Plaintiff-intervenor alleges in essence that certain provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA") exceed Congress' constitutional authority under the Commerce Clause, and that PURPA violates

the due process clause of the Fifth and Fourteenth Amendments, the Guarantee Clause (Article IV, Section 4), the Supremacy Clause (Article VI, Section 2) and the Tenth Amendment.

In reviewing a constitutional challenge to Congress' exercise of its Commerce Clause power, the Court's sole function is to decide, based on the statutory language and the legislative history, whether Congress had a rational basis for determining that legislation is necessary or appropriate, and whether Congress selected a reasonable means of regulating commerce among the states. *Arizona Public Service Co.* v. *Snead*, —— U.S. ——, 97 S.Ct. 1629, 1634 (1979); *Perez* v. *United States*, 402 U.S. 146, 154-56 (1972); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258-59 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294, 303-04 (1964). Similarly, the Court's decision as to whether a statute violates any constitutional provisions is based on an analysis of general constitutional principles and the particluar statute at issue. *See*, *Heart of Atlanta Motel, Inc.* v. *United States*, *supra* at 258-61, 277.

Therefore, it is only what was before Congress that is relevant to the decision in this case. Studies prepared for, or which are within the knowledge of defendant Duncan, as requested in Interrogatories 1-5, 18, 19 and 20, and particularly any studies perfo.med after PURPA's enactment, have no bearing on the constitutionality of PURPA. In addition, the actions taken by defendant Duncan since the passage of PURPA, as requested in Interrogatories 11-16, are irrelevant.

Plaintiff-intervenor, an electric utility company, lacks standing to raise Tenth Amendment challenges to PURPA, because it cannot show that it has sustained or is in immediate danger of sustaining any direct injury from any alleged infringement of state sovereignty. Accordingly, it is not the proper party to raise Tenth Amendment or any other claims relating to state sovereignty. *Warth* v. *Seldin*, 422 U.S. 490, 518 (1975); *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972). Therefore, defendant Duncan objects to Interrogatories 7-10, 17 and 22 as inquiring into an issue plaintiff-

intervenor lacks standing to raise, and to Interrogatories 1-6, 11-16, and 18-20 insofar as they are intended to gather information concerning any alleged infringement of state sovereignty.

Defendant Duncan also objects to plaintiff-intervenor's seeking information in the possession of the Federal Energy Regulatory Commission ("the Commission") through him. As set forth in Section 401(a) and (d) of the Department of Energy Organization Act, 91 Stat. 582-583, to be codified as 42 U.S.C. § 7171, the Commission is an "independent regulatory commission," whose "members, employees or other personnel" are not subject to the "supervision or direction" of defendant Duncan.

Nevertheless, in an effort to be cooperative, but without waiving any of his objections, defendant Duncan, with the input of defendant Commission, submits the following responses to plaintiff-intervenor's interrogatories.

INTERROGATORY NO. 1:

Describe any record or memoranda concerning the constitutionality of PURPA or rules or proposed rules implementing PURPA, or concerning limitations on your powers under PURPA under either the Constitution or laws of the United States.

ANSWER TO INTERROGATORY NO. 1:

A memo dated September 19, 1979 was prepared by the staff of the General Counsel's Office of the Commission addressing the Tenth Amendment issues raised by this litigation with respect to Section 210 of PURPA.

INTERROGATORY NO. 2:

State whether any study has been made to evaluate the environmental impact of PURPA and said rules; and, if so, either attach a copy thereof, or describe the record thereof.

ANSWER TO INTERROGATORY NO. 2:

With regard to three sets of rules issued by the Department of Energy (DOE) to implement certain sections of PURPA, the determination was made that DOE's involvement does not entail a major federal action significantly affecting the quality of the human environment, and that preparation of an environmental assessment or an environmental impact statement is therefore not required. The proposed regulations are at 44 Fed. Reg. 18452 (March 27, 1979); 44 Fed. Reg. 18856 (March 29, 1979); and 44 Fed. Reg. 22974 (April 17, 1979). The final regulations are at 44 Fed. Reg. 40044 (July 6, 1979); 44 Fed. Reg. 40252 (July 9, 1979); and 44 Fed. Reg. 47364 (August 13, 1979).

INTERROGATORY NO. 3:

State whether any study has been made to evaluate the economic impact of enforcing PURPA and said rules; and, if so, either attach a copy thereof, or describe the record thereof.

ANSWER TO INTERROGATORY NO. 3:

With regard to the same rules cited in response to Interrogatory #2, the determination was made that the publication of the rules does not constitute a significant regulatory action, and that preparation of an analysis of the economic impact of the regulations pursuant to E.O. 12044 (43 Fed. Reg. 12661, March 24, 1978) is therefore not required.

INTERROGATORY NO. 4:

State whether any study has been made to determine the planned or actual cost of enforcing PURPA and said rules; and, if so, either attach a copy thereof or describe the record thereof.

ANSWER TO INTERROGATORY NO. 4:

DOE does not "enforce" PURPA, and has not made any study concerning the overall costs of implementing this Act.

INTERROGATORY NO. 5:

5. State whether any study has been made to determine or estimate the cost imposed upon utilities and their customers for complying with Section 133 of Title I of PURPA; and, if so, either attach a copy thereof, or describe the record thereof.

ANSWER TO INTERROGATORY NO. 5:

No "study" has been made, but the Commission has solicited comments from utilities concerning costs which may be incurred. See 44 Fed. Reg. 33847 (June 13, 1979).

INTERROGATORY NO. 6:

Do you admit or contend that PURPA imposes responsibilities on the State regulatory agencies (including the plaintiff) and certain retail electric utilities (including the intervenor) for the purpose of achieving the three purposes of Title I, Section 101, of PURPA?

ANSWER TO INTERROGATORY NO. 6:

Defendant Duncan admits that, as stated on page 67 of the Conference Report accompanying PURPA, Sen. Rep. No. 95-1292, 95th Cong., 2d Sess., the Act "does not change the primary responsibility of the States with respect to electric utility rates, but it places certain Federal responsibilities and obligations on the State commissions in the exercise of their responsibilities and on utilities within the States which are not otherwise regulated by State Commissions."

INTERROGATORY NO. 7:

Do you admit or contend that for purposes of considering and determining the appropriateness of the rate-making and other standards of Sections 111 and 113 of Title I of PURPA, for adoption by the Mississippi Public Service Commission, said three purposes or Title I, Section 101, "supplement state law"?

ANSWER TO INTERROGATORY NO. 7:

Defendant Duncan admits that, as stated at pages 70-71 of the Conference Report, *supra*, the purposes of Title I, Section 101 of PURPA "supplement, but do not override State law."

INTERROGATORY NO. 8:

Do you admit or contend said purposes of Section 101 as supplementary state law may be repealed or amended by the Congress of the United States, the Legislature of the State of Mississippi, and/or both?

ANSWER TO INTERROGATORY NO. 8:

Section 101 of PURPA, like any other provision of an Act of Congress, may be repealed or amended by Congress. A federal law cannot, of course, be repealed or amended by the Legislature of the State of Mississippi.

INTERROGATORY NO. 9:

Do you admit or contend that said purposes of Section 101 are part of the "supreme law of the land" under Article VI, Section 2, of the *United States Constitution*?

ANSWER TO INTERROGATORY NO. 9:

See response to Interrogatory #7.

INTERROGATORY NO. 10:

State whether the U.S. Congress has ever passed another law as a "supplementary" state law and, if so, give the citation thereof.

ANSWER TO INTERROGATORY NO. 10:

Defendant Duncan has no knowledge as to whether the U.S. Congress has ever passed another law as a "supplementary" state law, and submits that the Statutes at Large of the United States are available for research by the plaintiff-intervenor.

INTERROGATORY NO. 11:

List the States in which you have intervened in regulatory proceedings for the purpose of enforcing PURPA; and state:

ANSWER TO INTERROGATORY NO. 11:

DOE does not "enforce" PURPA. It has filed petitions to intervene in State Commission proceedings in Connecticut, Delaware and Virginia in order to participate in these proceedings.

INTERROGATORY NO. 12:

The number of witnesses, consultants and attorneys respectively participating in each of these on your behalf; and

ANSWER TO INTERROGATORY NO. 12:

The proceedings in Virginia and Delaware are still in preliminary stages. At this time, DOE expects to use one staff witness, one consultant and one attorney as participants in each of these hearings.

In Phase I of the bifurcated Connecticut proceeding, DOE used three staff witnesses, one contractor and one attorney. In Phase II, which is now proceeding, DOE has used one staff witness, one consultant, and one attorney in its presentation to date.

INTERROGATORY NO. 13:

The approximate cost of such participation in each proceeding; and

ANSWER TO INTERROGATORY NO. 13:

Since no proceeding has been completed, no approximation of cost can be made at this time.

INTERROGATORY NO. 14:

The approximate time spent by you during each such hearing in making your presentation or case; and

ANSWER TO INTERROGATORY NO. 14:

Since no proceeding has been completed, no approximation of time can be made at present.

INTERROGATORY NO. 15:

The amount of money or other assistance given or to be granted by you to the State Regulatory Agency involved in each such proceedings [sic]; and

ANSWER TO INTERROGATORY NO. 15:

Connecticut's Public Utilities Commission will receive $630,000. Virginia will be awarded $700,000, and Delaware will be awarded $376,000.

INTERROGATORY NO. 16:

List the proceedings in which you or the Federal Energy Regulatory Commission have appealed or intervened in an appeal for the purpose of implementing PURPA.

ANSWER TO INTERROGATORY NO. 16:

None.

INTERROGATORY NO. 17:

Do you contend or admit that the three purposes of PURPA (Title I, Section 101) supplement but do not override the law of Mississippi and that said purposes also expand the discretion of the Mississippi Public Service Commission to adopt the standards of Section 111?

ANSWER TO INTERROGATORY NO. 17:

See response to Interrogatory #7. Defendant Duncan has no knowledge as to the discretion of the Mississippi Public Service Commission under State law, and therefore cannot answer the second part of this interrogatory.

INTERROGATORY NO. 18:

Please describe briefly any attempts made since 1970 by federal agencies to assess the cost-effectiveness of the federal standards and rate-structure changes required to be considered by PURPA (Sections 111, 113, 114 and 115 of Title I), giving the name of the agency, the date of the study, the use made of such study, the name of any report thereon, and the length of time required to make same; and describe any record thereasto or attach a copy thereof.

ANSWER TO INTERROGATORY NO. 18:

Defendant Duncan has no knowledge of any studies for the specific purpose of assessing the cost-effectiveness of the PURPA standards. However, see the enclosed *Annotated Summaries, Electric and Gas Utility Topics: Current Documents* (July 1979), for a description of documents relating to standards for utilities.

INTERROGATORY NO. 19:

Please state any estimate which has been made by you or is known to you as to the cost of and/or time required for determining the appropriateness of the federal standards as required by PURPA, as to each state regulatory agency, especially the intervenor; and describe the record of such estimate, or attach a copy.

ANSWER TO INTERROGATORY NO. 19:

One study is known to defendant Duncan, which includes an estimate of costs. This study was prepared by

the Electric Power Research Institute ("EPRI") for the National Association of Regulatory Utility Commissioners, and is entitled *Electric Utility Rate Design Study—Reference Manual & Procedures For Implementing PURPA.* Copies of this study should be available from EPRI. No such studies have been prepared by defendant Duncan.

INTERROGATORY NO. 20:

Please describe the regulatory design studies on which the standards (Sections 111, 113, 114, 115 of Title I) required to be considered by PURPA were based, so far as you know or believe.

ANSWER TO INTERROGATORY NO. 20:

Pursuant to Section 203 of the Energy Conservation and Production Act, P.L. 94-385, the Secretary developed proposals which are set forth in *Electric Utility Rate Design Proposals, Interim Report.* Defendant Duncan has no knowledge as to whether any other regulatory design studies were relied upon by Congress in enacting PURPA. Insofar as any such studies are referred to in the legislative history, this information is available to plaintiff-intervenor.

INTERROGATORY NO. 21:

21. State any criminal or civil penalties or sanctions which may be imposed upon the plaintiffs and/or intervenor for violation of PURPA or any of defendants' rules implementing same; and the citations of the law or rule imposing same.

ANSWER TO INTERROGATORY NO. 21:

The provisions concerning judicial review and enforcement of the standards of Title I are in Section 123 of PURPA, which does not provide for civil or criminal penalties. As set forth in Section 133(d) of PURPA,

which is enforced by the Commission, sanctions may be imposed for violation of the cost information gathering requirements of Section 133(a). The sanctions are specified in Section 12 of the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 797, which is available to plaintiff. Final regulations implementing Section 133 of PURPA have been published at 44 Fed. Reg. 33847 (June 13, 1979).

INTERROGATORY NO. 22:

Do you admit or contend that the federal standards set forth in PURPA (Title I, Sections 111, 113 and 114; Title III, Section 303) represent a rate-design policy or policies selected by Congress, with the intention of requiring the adoption of the same by the plaintiffs unless they can show cause in a hearing why said standards are not appropriate for achieving within their jurisdiction the three purposes of Section 101?

ANSWER TO INTERROGATORY NO. 22:

Defendant Duncan admits that the nature of the States' responsibilities for determining whether the federal standards in PURPA should be implemented are set forth in Titles I and III of PURPA. In addition, the intent of Congress, as expressed at page 72 of the Conference Report, *supra*, is that "State law governs on such matters as burden of proof, standard for review in State courts, and in any other matters not inconsistent with the requirements of this title."

INTERROGATORY NO. 23:

Identify each/the [sic] individuals you expect to call as witnesses and expert witnesses at the trial of this cause; and, as to each expert witness, state the subject matter on which he is expected to testify, the substance of the facts and opinions on which he is expected to testify and a summary of the grounds for each opinion.

ANSWER TO INTERROGATORY NO. 23:

Defendant Duncan contends that only issues of law must be decided, and expects that this case can be resolved by summary judgment.

INTERROGATORY NO. 24:

Explain briefly your defenses to this intervenor's complaint.

ANSWER TO INTERROGATORY NO. 24:

Defendant Duncan contends that the enactment of PURPA is a rational exercise of Congress' constitutional authority, and that no provisions of the United States Constitution are violated by any of the sections of this Act.

I declare under penalty of perjury that the foregoing responses provided on behalf of defendant Duncan are true and correct.

/s/ Howard Perry
HOWARD PERRY
Director
Division of Utility Regulatory Assistance
Economic Regulatory Administration
Department of Energy

/s/ Carl H. Kaplan
CARL H. KAPLAN
Deputy Director
Division of Regulatory Proceedings
Economic Regulatory Administration
Department of Energy

IN THE UNITED STATES DISTRICT COURT
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FEDERAL ENERGY REGULATORY COMMISSION, and
CHARLES W. DUNCAN, JR., Secretary of Energy,
DEFENDANTS

RESPONSE TO MISSISSIPPI POWER & LIGHT COMPANY'S FIRST SET OF INTERROGATORIES TO FEDERAL ENERGY REGULATORY COMMISSION

GENERAL OBJECTIONS

Defendant Federal Energy Regulatory Commission objects to plaintiff-intervenor Mississippi Power and Light Company's First Set of Interrogatories because it seeks information which is irrelevant to the issues to be decided in this case, and because plaintiff-intervenor has no standing to allege that a federal statute violates state sovereignty.

INTERROGATORY NO. 1:

Describe any record or memoranda concerning the constitutionality of PURPA or rules or proposed rules implementing PURPA, or concerning limitations on your powers under PURPA under either the *Constitution* or laws of the United States.

ANSWER TO INTERROGATORY NO. 1:

A memo dated September 19, 1979 was prepared by the staff of the General Counsel's Office of the Commission addressing the Tenth Amendment issues raised by this litigation with respect to Section 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 (PURPA).

INTERROGATORY NO. 2:

State whether any study has been made to evaluate the environmental impact of PURPA and said rules; and, if so, either attach a copy thereof, or describe the record thereof.

ANSWER TO INTERROGATORY NO. 2:

A draft environmental assessment has been prepared, in connection with proposed regulations concerning sections 201 and 210 of PURPA, to determine those relevant technologies which will not significantly affect the quality of the human environment.

An environmental impact statement is being prepared with respect to those technologies which it was determined may significantly affect the quality of the human environment.

INTERROGATORY NO. 3:

State whether any study has been made to evaluate the economic impact of enforcing PURPA and said rules; and, if so, either attach a copy thereof, or describe the record thereof.

ANSWER TO INTERROGATORY NO. 3:

The Commission has made no study to evaluate the economic impact of enforcing PURPA, nor is it subject to E.O. 12044 (43 Fed. Reg. 12661, March 24, 1978).

INTERROGATORY NO. 4:

State whether any study has been made to determine the planned or actual cost of enforcing PURPA and said rules; and, if so, either attach a copy thereof or describe the record thereof.

ANSWER TO INTERROGATORY NO. 4:

The Commission has not made any study concerning the overall costs of "enforcing PURPA" or the rules adopted thereunder.

INTERROGATORY NO. 5:

State whether any study has been made to determine or estimate the cost imposed upon utilities and their customers for complying with Section 133 of Title I of PURPA; and, if so, either attach a copy thereof, or describe the record thereof.

ANSWER TO INTERROGATORY NO. 5:

No "study" has been made, but the Commission solicited comments from utilities concerning costs which may be incurred. In response to these comments the final regulations incorporated changes to reduce compliance costs. These comments are summarized in the preamble to the final regulations. See 44 Fed. Reg. 33,847 (June 13, 1979).

INTERROGATORY NO. 6:

Do you admit or contend that PURPA imposes responsibilities on the State regulatory agencies (including the plaintiff) and certain retail electric utilities (including the intervenor) for the purpose of achieving the three purposes of Title I, Section 101, of PURPA?

ANSWER TO INTERROGATORY NO. 6:

The Commission admits that, as stated on page 67 of the Conference Report accompanying PURPA, Sen. Rep. No. 95-1292, 95th Cong. 2d Sess., the Act "does not change the primary responsibility of the States with respect to electric utility rates, but it places certain Federal responsibilities and obligations on the State commissions in the exercise of their responsibilities and on utilities within the States which are not otherwise regulated by State Commissions."

INTERROGATORY NO. 7:

Do you admit or contend that for purposes of considering and determining the appropriateness of the rate-making and other standards of Sections 111 and 113 of Title I of PURPA, for adoption by the Mississippi Public Service Commission, said three purposes or Title I, Section 101, "supplement state law"?

ANSWER TO INTERROGATORY NO. 7:

The Commission admits that, as stated at pages 70-71 of the Conference Report, *supra*, the purpose of Title I, Section 101 of PURPA "supplement, but do not override State law."

INTERROGATORY NO. 8:

Do you admit or contend said purposes of Section 101 as supplementary state law may be repealed or amended by the Congress of the United States, the Legislature of the State of Mississippi, and/or both?

ANSWER TO INTERROGATORY NO. 8:

Section 101 of PURPA, like any other provision of an Act of Congress, may be repealed or amended by Congress. A federal law cannot, of course, be repealed or amended by the Legislature of the State of Mississippi.

INTERROGATORY NO. 9:

Do you admit or contend that said purposes of Section 101 are part of the "supreme law of the land" under Article VI, Section 2, of the *United States Constitution?*

ANSWER TO INTERROGATORY NO. 9:

See response to Interrogatory #7.

INTERROGATORY NO. 10:

State whether the U.S. Congress has ever passed another law as a "supplementary" state law and, if so, give the citation thereof.

ANSWER TO INTERROGATORY NO. 10:

The Commission has no knowledge as to whether the U.S. Congress has ever passed another law as a "supplementary" state law, and submits that the Statutes at Large of the United States are available for research by the plaintiff-intervenor.

INTERROGATORY NO. 11:

List the States in which you have intervened in regulatory proceedings for the purpose of enforcing PURPA; and state:

ANSWER TO INTERROGATORY NO. 11:

The Commission has filed no petitions to intervene in State Commission proceedings for the purpose of enforcing PURPA.

INTERROGATORY NO. 12:

The number of witnesses, consultants and attorneys respectively participating in each of these on your behalf;

ANSWER TO INTERROGATORY NO. 12:

Not applicable. See response to interrogatory No. 11.

INTERROGATORY NO. 13:

The approximate cost of such participation in each proceeding; and

ANSWER TO INTERROGATORY NO. 13:

Not applicable.

INTERROGATORY NO. 14:

The approximate time spent by you during each such hearing in making your presentation or case; and

ANSWER TO INTERROGATORY NO. 14:

Not applicable.

INTERROGATORY NO. 15:

The amount of money or other assistance given or to be granted by you to the State Regulatory Agency involved in each such proceedings [sic]; and

ANSWER TO INTERROGATORY NO. 15:

Not applicable.

INTERROGATORY NO. 16:

List the proceedings in which you or Secretary of Energy have appealed or intervened in an appeal for the purpose of implementing PURPA.

ANSWER TO INTERROGATORY NO. 16:

None by the Commission. The Commission has no information with respect to the Secretary of Energy except that reflected in his answer to Interrogatory No. 19 of Plaintiff-Intervenor's First Set of Interrogatories.

INTERROGATORY NO. 17:

Do you contend or admit that the three purposes of PURPA (Title I, Section 101) supplement but do not override the law of Mississippi and that said purposes also expand the discretion of the Mississippi Public Service Commission to adopt the standards of Section 111?

ANSWER TO INTERROGATORY NO. 17:

See response to Interrogatory #7. The Commission has no knowledge as to the discretion of the Mississippi Public Service Commission under State law, and therefore cannot answer the second part of this interrogatory.

INTERROGATORY NO. 18:

Please describe briefly any attempts made since 1970 by federal agencies to assess the cost-effectiveness of the federal standards and rate-structure changes required to be considered by PURPA (Sections 111, 113, 114 and 115 of Title I), giving the name of agency, the date of the study, and use made of such study, the name of any report thereon, and the length of time required to make same; and describe any record thereasto or attach a copy thereof.

ANSWER TO INTERROGATORY NO. 18:

The Commission has no knowledge of any studies for the specific purpose of assessing the cost-effectiveness of the PURPA standards.

INTERROGATORY NO. 19:

Please state any estimate which has been made by you or is known to you as to the cost of and/or time required for determining the appropriateness of the federal standards as required by PURPA, as to each state regulatory agency, especially the intevenor; and describe the record of such estimate, or attach a copy.

ANSWER TO INTERROGATORY NO. 19:

The Commission has made no study and is unaware of any except the one referred to by Secretary Duncan in his answer to Interrogatory No. 19 in Plaintiff-Intervenor's First Set of Interrogatories.

INTERROGATORY NO. 20:

Please describe the regulatory design studies on which the standards (Sections 111, 113, 114, 115 of Title I) required to be considered by PURPA were based, so far as you know or believe.

ANSWER TO INTERROGATORY NO. 20:

The Secretary of Energy in his response to Interrogatory 20 noted that pursuant to Section 203 of the Energy Conservation and Production Act, P.L. 94-385, he had developed proposals which are set forth in *Electric Utility Rate Design Proposals, Interim Report.* The Commission has no knowledge as to whether any other regulatory design studies were relied upon by Congress in enacting PURPA. Insofar as any such studies are referred to in the legislative history, this information is available to plaintiff-intervenor.

INTERROGATORY NO. 21:

State any criminal or civil penalties or sanctions which may be imposed upon the plaintiffs and/or intervenor for violation of PURPA or any of defendants' rules implementing same; and the citations of the law or rule imposing the same.

ANSWER TO INTERROGATORY NO. 21:

The provision concerning judicial review and enforcement of the standards of Title I are in Section 123 of PURPA, which does not provide for civil or criminal penalties. As set forth in Section 133(d) of PURPA,

sanctions may be imposed for violation of the cost information gathering requirements of Section 133(a). The sanctions are specified in Section 12 of the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 797, which is available to plaintiff. Section 210 of PURPA contains provisions for judicial review and enforcement of the requirements of Section 210; the Commission is authorized thereunder to invoke the penalty provisions of the Federal Power Act.

Other enforcement and judicial review provisions in PURPA, if relevant, are available to plaintiff-intervenor by an examination of that statute.

INTERROGATORY NO. 22:

Do you admit or contend that the federal standards set forth in PURPA (Title I, Section 111, 113 and 114; Title III, Section 303) represent a rate-design policy or policies selected by Congress, with the intention of requiring the adoption of the same by the plaintiffs unless they can show cause in a hearing why said standards are not appropriate for achieving within their jurisdiction the three purposes of Section 101?

ANSWER TO INTERROGATORY NO. 22:

The Commission admits that the nature of the States' responsibilities for determining whether the federal standards in PURPA should be implemented are set forth in Titles I and III in PURPA.

I declare under penalty of perjury that the foregoing responses provided on behalf of the Federal Energy Regulatory Commission are true and correct.

ROSS AIN
Associate General Counsel
for Legislation and
Regulatory Development

The objections to Mississippi Power & Light Company's Interrogatories are made by counsel for defendant Federal Energy Regulatory Commission.

Respectfully submitted,

JEROME NELSON
Solicitor

JOANNE LEVEQUE
Attorney

For Defendant
Federal Energy Regulatory
Commission
Washington, D.C. 20426

December 21, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0212(C)

THE STATE OF MISSISSIPPI, by and through A. F. SUMMER, Attorney General of the State of Mississippi; and MISSISSIPPI PUBLIC SERVICE COMMISSION, D. W. SNYDER, Chairman, NORMAN A. JOHNSON, JR., Vice Chairman, and JOHN L. DALE, as Commissioners thereof, acting by and through A. F. SUMMER, Attorney General of the State of Mississippi, PLAINTIFFS

v.

FEDERAL ENERGY REGULATORY COMMISSION and CHARLES W. DUNCAN, JR., Secretary of Energy, DEFENDANTS

MISSISSIPPI POWER & LIGHT COMPANY, INTERVENOR

MOTION FOR SUMMARY JUDGMENT

Come now Plaintiffs herein and move, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, for judgment on the grounds that there is no genuine issue as to any material fact, and, therefore, Plaintiffs are entitled to judgment as a matter of law.

This Motion is based upon the pleadings filed herein, the Interrogatories filed by Mississippi Power & Light Company and the original and supplementary Responses

thereto, and the Affidavits attached hereto as Exhibits 1 and 2.

Respectfully submitted,

/s/ Alex A. Alston, Jr.
ALEX A. ALSTON, JR.
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Jackson, Mississippi 39205

/s/ Hiram Eastland
HIRAM EASTLAND
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Special Counsel for Plaintiffs

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100 Court Street
Indianola, Mississippi 38751
601—887-3412
Of Counsel

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0212(C)

THE STATE OF MISSISSIPPI, by and through A. F. SUMMER, Attorney General of the State of Mississippi; and MISSISSIPPI PUBLIC SERVICE COMMISSION, D. W. SNYDER, Chairman, NORMAN A. JOHNSON, JR., Vice Chairman, and JOHN L. DALE, as Commissioners thereof, acting by and through A. F. SUMMER, Attorney General of the State of Mississippi, PLAINTIFFS

v.

FEDERAL ENERGY REGULATORY COMMISSION and CHARLES W. DUNCAN, JR., Secretary of Energy, DEFENDANTS

MISSISSIPPI POWER & LIGHT COMPANY, INTERVENOR

AFFIDAVIT IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF MISSISSIPPI

COUNTY OF HINDS

C. KEITH HOWLE, after being duly sworn, stated the following:

1. My name is C. Keith Howle. I am currently employed as Director of Utilities, Mississippi Public Service

Commission, and I have served in this capacity since August, 1968. I have been employed by the Mississippi Public Service Commission for over twenty-two years, serving as Investigator for the Utility Department, Chief Investigator and now Director of Utilities. I am authorized and qualified to make this Affidavit on behalf of the Mississippi Public Service Commission. I am personally familiar with all of the facts set forth herein, and I make this Affidavit in support of Plaintiff Mississippi Public Service Commission's Motion for Summary Judgment.

2. The Mississippi Public Service Commission was created by the Mississippi State Legislature [*Miss. Code Ann.* § 77-1-1 (1972)] and has been accorded by the Legislature the exclusive original jurisdiction over the intrastate business and property of public utilities [*Miss. Code Ann.* § 77-3-5 (1972)].

3. The Mississippi Public Service Commission [hereinafter "Commission"] has historically been the state commission charged by the state legislature with the state police power function of regulating the utilities, motor carriers, railroads and other common carriers, gas pipelines and distribution systems, and with supervising this operation so as to insure that these services are properly provided to the citizens of Mississippi. When the Commission's forerunner, the Railroad Commission, was created in 1884, its duties were confined primarily to the supervision and regulation of Mississippi railroads. In 1892 the state legislature noted the continued progress of express, telephone and telegraph activities, and placed these services within the jurisdiction of the Railroad Commission. By 1926 the increasing demand for truck and bus transportation prompted the legislature to place these services under the authority of the Railroad Commission.

4. With the passage of the Motor Carrier Act in 1938, the name of the Railroad Commission was changed to the Public Service Commission, and the Commission-

ers, previously appointed, became elected. In 1956 the legislature placed within the jurisdiction of the Commission the intrastate operation of all utilities: telephone, telegraph, electric, natural gas and water. Since that time the Commission has determined the legality of rates charged by the regulated utilities and has supervised their operation within the State of Mississippi in accordance with its mandate from the Mississippi Legislature.

5. The State of Mississippi has delegated to the Commission the power and authority to regulate utilities and other entities coming within its jurisdiction. To carry out these essential governmental functions, the Commission must be free to determine both the substantive law and the procedures that it will follow. If the statutory scheme of the Public Utilities Regulatory Act of 1978, Public Law 95-617 [hereinafter referred to as "PURPA" and attached hereto as Exhibit "A"] and its regulations are forced upon the Commission, it would displace state policies regarding the manner in which the Commission structures the delivery of governmental services which the citizens of this state require. PURPA directly supplants the considered policy choices of the legislature of this state as to how it wishes the Commission to operate and to perform its governmental function.

6. PURPA "supplements" state law by adding federal substantive standards dealing with: cost of service, declining block rates, time-of-day rates, seasonal rates, interruptable rates, load management techniques [§ 111(d)] master metering, automatic adjustment clauses, information to consumers, procedures for termination of electric service, and advertising [§ 113(b)]. The federal standards for some of these items—cost of service, time-of-day rates, load management techniques, master metering, automatic adjustment clauses, information to consumers, procedures for termination of electric service and advertising—are further elaborated in § 115 and by regulations issued by DOE. State regulatory authorities are required to consider these federal standards in State retail rate-making

proceedings and, in effect, to adopt same unless able to determine the same inappropriate by written findings based on substantial evidence.

7. The Act also prescribes a number of procedural requirements which the Commission must follow in considering the federal standards. Public notice and a hearing are required. The Commission's determination must be "(A) in writing, (B) based upon findings included in such hearing, and (C) available to the public." § 111(b). Under circumstances any participant or intervenor in an individual rate case may require consideration of the federal standards in the State rate proceeding despite the problems of delay thus caused and the threat to the Commission's jurisdiction. § 112(a). State regulatory authorities are given a three-year deadline in which to consider voluntary application of the federal standards to individual utilities under their jurisdiction. If they fail to do so, they are required to consider the federal standards in the first rate proceeding for each utility commenced three years after the date of enactment. §§ 112(b) and 112(c). In addition, the Secretary of Energy, any affected electric utility or any electric consumer of an affected electric utility may intervene and participate as of right in State rate-making proceedings or other agency proceedings relating to rates or rate design. § 121(a). State regulatory authorities are also required to promulgate "reasonable rules relating to discovery of information." § 121(b). Unless the State regulatory agency provides a means for compensating intervenors who are consumers of an electric utility, that utility is liable to compensate the intervenor for "reasonable attorney's fees, expert witness fees, and other reasonable costs incurred in preparation and advocacy of [the position to which the consumer substantially contributed and on which he prevailed in whole or in part in the rate-making proceeding]." § 122(a). Unless the State regulatory authority has established a procedure for the determination and payment of compensation, the consumer may bring an action to collect fees and costs "in any State court of competent jurisdiction." § 122(a)(1).

8. The cost of operation of the Commission will increase substantially if the provisions of PURPA and its Regulations are imposed upon this state. It is reasonably estimated that the cost of implementing PURPA by the Commission over the next ten years would exceed two million dollars. It is reasonably estimated that compliance with PURPA would require an increase of almost $200,000 in the annual Commission's budget. The cost of even submitting a proposal to the Department of Energy to comply with PURPA would exceed $360,000, as evidenced by copy of letter from Ernst & Ernst attached hereto as Exhibit "B". The employees of the Commission are already working to capacity. It is reasonably estimated that compliance with PURPA would necessitate an increase of at least five executive employees and three secretaries. Since funds for such employees are not provided in the Commission's budget, compliance with PURPA would necessitate curtailment of essential functions of the Commission despite State law to the contrary. A copy of the Commission's analysis of estimated cost of implementing PURPA is attached hereto as Exhibit "C".

9. It is difficult at best to visualize how the Commission could even exist under its limited budget if it is required to comply with PURPA and its Regulations. The Mississippi Public Service Commission has always taken pride in the fact that it can operate on a limited budget and deliver its governmental services in a prompt and efficient manner.

10. PURPA requires that the utility regulatory commissions of the several states perform certain affirmative acts and seeks to regulate directly the activities of the Commission in the performance of its duties specifically delegated to it by the Legislature of the State of Mississippi.

11. Under the present law in Mississippi, when a public utility desires to change its rate, it must first file with the Commission a schedule or notice stating that its new rates differ from those previously in effect. Upon such

notice the Commission may, either upon complaint or upon its own initiative, after reasonable notice, conduct a hearing for the purpose of determining the legality of the new rates. The Commission is required by *Miss. Code Ann.* § 77-3-39 (1972) to complete its determination *within no more than six months* of the filing of the notice of rate change by the affected public utility. The increased work load placed upon the Commission by the provisions of PURPA, without any provision for additional employees to take care of the same, will prevent the Commission from efficiently performing its duties under state law and from making its rate determinations within the statutory six-month period.

12. Section 111 of PURPA establishes six federal standards to be used by the several state regulatory commissions in determining rates to be charged by public electric utilities. Section 112 of PURPA places upon the several state regulatory commissions the obligation to consider each of the standards established in Section 111 and to make a determination with respect to the propriety of using such standards in determining the rate to be charged by the various electric utilities for which the particular regulatory commission has rate-making authority. PURPA requires the state regulatory commission to consider the standards and to make its determination "not later than two years after the date of the enactment of this Act." § 112(b)(1). PURPA also imposes upon the states certain procedural requirements for PURPA's required consideration and determination. PURPA requires that the consideration of the standards shall be made after public notice and hearing and that the determination respecting the standards shall be in writing and based upon findings included in such determination and upon the evidence presented at the hearing. If the state regulatory authority declines to implement any standard, it must state its reasons in writing. The PURPA requirements that the state regulatory authorities consider federally established stand-

ards according to federally established procedure and render written determination with respect to whether the particular regulatory authority will adopt such standards imposes upon the several regulatory authorities the obligation to perform affirmative acts. The Mississippi Public Service Commission has not of its own discretion chosen to perform the acts required by PURPA. The imposition of the PURPA requirements interferes with the regulatory and procedural policies lawfully formulated by the Commission pursuant to its mandate from the Mississippi State Legislature.

13. Section 113 of PURPA establishes five federal standards with respect to electric utilities which, unlike the standards established by Section 111, do not all directly relate to the rate structure of electric utilities but rather relate to other practices of electric utilities regarding terms and conditions of electric service that may indirectly affect the rate structure of the utilities. Section 113, as to electric utilities, and Section 303, as to gas utilities, require that each regulatory authority adopt the five standards established therein or state in writing that it has determined not to adopt such standards together with the reasons for such determination. Section 113 and Section 303 further require that the statement of reasons shall be available to the public. Section 113 and Section 303 of PURPA place upon the state regulatory authorities the affirmative duty to consider and decide whether to adopt the five standards set forth therein. The Mississippi Public Service Commission has not chosen of its own discretion to consider such standards. The imposition upon the Commission of the duty to consider such standards and to make such determination by PURPA amounts to federal interference with the regulatory policies lawfully formulated by the Commission pursuant to its mandate from the Legislature of the State of Mississippi.

14. Section 121 of PURPA confers upon the Secretary of Energy, any affected utility or any electric con-

sumer of an affected utility the absolute right to intervene and to participate "in any rate-making proceeding or other appropriate regulatory proceeding relating to rates or rate design which is conducted by a state regulatory authority . . . ." [See, also, Section 305.] Rule 2(j) of the Commission's *Utility Rules of Practice and Procedure* allows the intervention of non-parties only at the discretion of the Commission and only after the parties have been heard on the proposed intervention. PURPA also confers upon intervenors access to all information available to the parties to the rate-making proceedings. PURPA's bestowal of automatic intervention rights on the Secretary of Energy, utilities and consumers directly conflicts with the state policy established by the Commission in its *Utility Rules of Practice and Procedure.*

15. PURPA requires electric utilities to gather extensive information for use in rate determination proceedings. Additionally, if an electric consumer substantially contributes "to the approval, in whole or in part, of a position advocated by such consumer in a proceeding concerning such utility, and relating to any standards set forth in subtitle (b), such utility shall be liable to compensate such consumer . . . for reasonable attorneys' fees, expert witness fees, and other reasonable costs incurred in preparation and advocacy of such position and such proceeding (including fees and costs of obtaining judicial review of any determination made in such proceeding with respect to such position)." Imposition of these requirements upon the electric utilities of this state usurps the authority of the Commission which is the sole body charged by the Mississippi Legislature with "original jurisdiction over the intrastate business and property of public utilities." Miss. Code Ann. § 77-3-5 (1972).

16. Massive regulations have now been promulgated under PURPA regulating adherence thereto and the filing of a myriad of documents, papers and tabulations

of various kinds. In fact, the Mississippi Public Service Commission recently was forwarded a letter from the Department of Energy advising that it appears that the Mississippi Public Service Commission was in violation of federal statutes for failure to file a 1979 report, a copy of such letter from the Department of Energy to the Chairman of the Mississippi Public Service Commission being attached hereto as Exhibit "D" and made a part of this Affidavit.

17. Requiring the Commission to comply with PURPA would substantially increase the financial burden borne by the Commission and ultimately the Mississippi taxpayer and electric consumer. The specification of the federal substantive standards and the imposition of the requirement that the Commission consider these and adopt federally mandated procedures will substantially alter the existing structure of the Mississippi Public Service Commission and the existing method which the Commission follows in the area of retail rate regulation. In addition, the requirements of PURPA will necessitate substantial increases in the Commission budget and personnel. It will add serious complexity to the rate cases heard by the Commission and will necessitate the expenditure of increased costs for experts. It will impose substantial delays in the face of Mississippi's six-month requirement to complete all rate cases. The Act, in effect, directly displaces the State of Mississippi's freedom to structure its Public Service Commission in the manner that it desires in the area of retail rate regulation.

In summary, PURPA places on the Commission an intolerable burden of time and money in its retail ratemaking function. Further, the Act constitutes a direct intrusion on the Commission in establishing it own rate-

making utility policies and the administrative and judicial procedures for enforcing same.

/s/ C. Keith Howle

SWORN TO AND SUBSCRIBED before me, this the 1st day of March, 1980.

/s/ Pauline H. Cochran
Notary Public

My Commission Expires June 15, 1983.

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0212(C)

THE STATE OF MISSISSIPPI, by and through A. F. SUMMER, Attorney General of the State of Mississippi; and MISSISSIPPI PUBLIC SERVICE COMMISSION, D. W. SNYDER, Chairman, NORMAN A. JOHNSON, JR., Vice Chairman, and JOHN L. DALE, as Commissioners thereof, acting by and through A. F. SUMMER, Attorney General of the State of Mississippi, PLAINTIFFS

v.

FEDERAL ENERGY REGULATORY COMMISSION and CHARLES W. DUNCAN, JR., Secretary of Energy, DEFENDANTS

MISSISSIPPI POWER & LIGHT COMPANY, INTERVENOR

AFFIDAVIT

STATE OF MISSISSIPPI

COUNTY OF HINDS

Personally appeared before me, the undersigned Notary Public in and for the jurisdiction aforesaid, the within named E. W. ROBINSON, who, being by me first duly sworn, made oath as follows:

1. My name is E. W. Robinson. I am Executive Secretary of the Mississippi Public Service Commission

[hereinafter "Commission"], and have been employed by the Commission since July 1, 1958. I have personal knowledge of the matters and facts set forth herein.

2. Pursuant to Sections 77-3-1 through 77-3-89, *Miss. Code Ann.* (1972), the Commission has the exclusive original jurisdiction over the intrastate business and property of public utilities as therein defined, including electric utilities, gas utilities, radio communication utilities and water utilities.

3. Pursuant to Section 77-3-87, *Miss. Code Ann.* (1972), a tax is imposed to pay all reasonable and necessary expenses of the administration of the duties imposed on the Commission in the amount of $700,000.00 per year, prorated among all utilities, the rates of which are subject to regulation by the Commission and all utilities not subject to rate regulation by the Commission which furnished to the ultimate consumer utility services, such as the generation, manufacturing, transmission or distribution of electricity to or for the public for compensation.

4. This tax is in accordance with law ultimately paid by the customers of such public utilities.

5. That necessary effect of the Public Utility Regulatory Policy Act of 1978 (Public Law 95-617, 92 STAT. 3119, 16 *U.S.C.* § 2601) will be to impose part of this tax on regulated public utilities in the telephone, radio communication and water fields, since Mississippi law makes no provision for any other form of proration of this tax.

6. That the Commission has exercised its supervisory jurisdiction over the rates of said regulated public utilities in accordance with the laws of the State of Mississippi as construed by the Supreme Court of Mississippi in such cases as *Southern Bell Telephone & Telegraph Co.* v. *Mississippi Public Service Commission*, 237 Miss. 157, 113 So.2d 622 (1959); and in performing its duties, the Commission has required said regulated public utilities to keep extensive and accurate financial records

showing the cost of service, that, is, the cost of service reflecting the embedded cost or fully allocated cost of service in which a utility's expenses and investment are allocated in accordance with traditional accounting principles, rather than reflecting marginal costs.

Further, Affiant saith not.

/s/ E. W. Robinson
E. W. ROBINSON

SWORN TO AND SUBSCRIBED before me by the Affiant, on his personal knowledge, this the 6 day of May, 1980.

/s/ Charles K. Howle
Notary Public

My Commission Expires: Oct. 18, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J79-0212(C)

THE STATE OF MISSISSIPPI, by and through A. F. SUMMER, Attorney General of the State of Mississippi; and MISSISSIPPI PUBLIC SERVICE COMMISSION, D. W. SNYDER, Chairman, NORMAN A. JOHNSON, JR., Vice Chairman, and JOHN L. DALE, as Commissioners thereof, acting by and through A. F. SUMMER, Attorney General of the State of Mississippi, PLAINTIFFS

v.

FEDERAL ENERGY REGULATORY COMMISSION and CHARLES W. DUNCAN, JR., Secretary of Energy, DEFENDANTS

MISSISSIPPI POWER & LIGHT COMPANY, INTERVENOR

INTERVENOR'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Mississippi Power & Light Company, the Intervenor herein, and respectfully moves, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, for judgment in its favor on the grounds that there is no genuine issue as to any material fact, and, therefore, Intervenor is entitled to judgment as a matter of law.

This Motion is based upon the pleadings filed herein, the Interrogatories filed by Mississippi Power & Light Company and the original and supplementary Responses agreed to be filed thereto, the Affidavits attached hereto

as Exhibits "I-1" and "I-2", and the legislative history of the Public Utility Regulatory Policies Act of 1978 (Public Law 95-617, 92 Stat. 3119, 16 *U.S.C.* Section 2601, *et seq.*), both prior and subsequent to its passage, including the "Joint Explanatory Statement of the Committee of Conference" and the Hearings on Oversight of the Subcommittee on Energy and Power of the Committee on Interstate and Foreign Commerce of the House of Representatives, 96th Congress.

Respectfully submitted,

/s/ James K. Child, Jr.
JAMES K. CHILD, JR.
WISE, CARTER, CHILD AND CARAWAY
Post Office Box 651
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Telephone: 601/354-2385

/s/ Joshua Green
JOSHUA GREEN
GREEN, CHENEY AND HUGHES
Post Office Box 1666
Jackson, Mississippi 39205
Telephone: 601/969-1969

EXHIBIT "I-1"

AFFIDAVIT

STATE OF MISSISSIPPI

COUNTY OF HINES

J. W. SCHIMPF, after being duly sworn, stated the following:

1. My name is J. W. Schimpf. I am currently employed as Director of Rates of Mississippi Power & Light Company, having served in this capacity since 1975. I am 47 years of age and a resident citizen of Jackson, Mississippi. My education has been as follows: B. A. in Math at Millsaps College in Jackson, Mississippi; Public Utility Executive course at Georgia Institute of Technology (1973); P.U.R. Guide, a Journey of Understanding the Public Utility Business (1968). I have done extensive reading in the field of electric utility rates. I have been involved in the study, formulation and administrative fixation of electric utility rates since 1956; and in the electric utility industry since 1953. I have been qualified as an expert witness in the field of electric utility regulation and accepted and allowed to testify as such by both the Federal Energy Regulatory Commission and the Mississippi Public Service Commission. I consider, therefore, that I am qualified to express an informed opinion as an expert in the field of electric utility rates. I am authorized and qualified to make this Affidavit on behalf of Mississippi Power & Light Company. This Affidavit is based upon my own personal knowledge and/or upon information prepared under my supervision in the usual course of business, of a type reasonably relied upon by experts in the field of electric utility regulation.

2. I have been in charge of the enforced compliance of the Mississippi Power & Light Company with the

Public Utility Regulatory Policies Act of 1978 (Public Law 95-617, 92 Stat. 3119, 16 *U.S.C.* Section 2601, *et seq.*; herein called "PURPA"), especially 16 *U.S.C.* Section 2643, as construed by the Federal Energy Regulatory Commission in its "Final Regulations" in Docket RM 79-6, issued June 5, 1979 and September 28, 1979 and amended January 4, 1980, true copies of which are hereto annexed and made a part hereof, as Exhibits "A", "B" and "C", respectively.

3. That in issuing the Final Regulations on "Procedures Governing Collection and Reporting of Information Concerning Cost of Providing Retail Electric Service," (18 CFR 290, Docket No. RM 79-61, June 5, 1979, 44 *Fed. Register*, No. 115, p. 33847), the Federal Energy Regulatory Commission conceded (44 *Fed. Register*, p. 33848): "it is true that Title I of PURPA does not use the words 'marginal costs.' * * * we do not dispute that this Commission and various State regulatory commissions have typically used the term 'costs' as synonymous with embedded or fully allocated costs * * *": but the Commission then proceeded to construe PURPA and its legislative history as authorizing the required production of marginal costs in addition to allocated or embedded costs.

4. That Section 290.303 of said Regulations (44 *Fed. Register*, p. 33871), defines "marginal entry cost at any hour" for reporting purposes, "as the cost of fuel and variable operating and maintenance expenses incurred in producing an additional killowatt-hour of electricity to supply all retail customers and those wholesale customers that are served under firm contracts. Marginal energy costs shall be equivalent to the fuel and variable operating and maintenance costs of the most expensive machine on line use of which will be increased or decreased in response to additional changes in demand."

5. That marginal cost information must be furnished in addition to the information as to embedded costs on which electric utility rates are traditionally based (Sub-

part A, 44 *Fed. Register*, p. 33852): "* * * the following information to develop fully allocated cost of service studies: rate base information including plant, depreciation, prepayments, accumulated deferred income tax, materials and supplies, electric plant held for future use, nuclear fuel material and construction work in progress data; operating expense information including operation and maintenance expense; and rate of return information."

6. That the information thus required by this Regulation will be extremely expensive to compile for the following reasons:

(a) Although the accounting records of the Mississippi Power & Light Company and other utilities regulated by the Mississippi Public Service Commission, are kept in accordance with the requirements of the Mississippi Public Service Commission and the Federal Energy Regulatory Commission, such records do not reflect the marginal cost information thus required.

(b) That, as to retail electric service, the cost of service, the rate base and rate of return of the Mississippi Power & Light Company and other utilities regulated by the Mississippi Public Service Commission have been fixed in accordance with the laws of the State of Mississippi by that Commission based on average embedded costs, rather than marginal costs; so that such marginal cost information has not been previously required and will not be found in the records of the Commission.

(c) As the Regulations recognize ("Calculations or Raw Data," 44 *Fed. Register*, p. 33849): "* * * many State regulatory commissions do not currently have the expertise necessary for conducting in-house cost of service studies * * *."

(d) The information is required on November 1, 1980, in accordance with the rules, methods and procedure prescribed by the FERC.

(e) The Federal Energy Regulatory Commission has not yet prescribed its final forms for submission of this information.

(f) Costs of meter equipment and of computer hardware and software, and costs of training personnel are high. (See Regulations, 44 *Fed. Register*, p. 33859, stating comment that new meter technology is being developed, as to research data).

(g) "The [Federal Energy Regulatory] Commission believes that the metering requirement will impose a heavy burden on many utilities and is thus limiting the classes for which sample metering is required" rather than prohibiting sample metering altogether. (Regulations of September 28, 1979, Subpart E, p. 53).

(h) Cost of service data must be broken down into customer cost component, demand cost component and energy cost component.

(i) Component personnel in the field of electric utility rate regulation are difficult to find and expensive to employ.

7. Based on my familiarity with and personal knowledge of the rates, financial records and condition of the Mississippi Power & Light Company, and my education and experience in the field of electric utility rates, I believe that I can express an informed opinion as an expert which may be reasonaly relied upon as to the cost of compliance by the Mississippi Power & Light Company with Section 133 of PURPA (16 *U.S.C.* Section 2643); that opinion is that the cost of such compliance with Section 133 of PURPA by Mississippi Power & Light Company is reasonably estimated to be approximately eight hundred sixty eight thousand dollars ($868,000.00) for each reporting period, based on 1979 dollars. This amount must be included in the costs used in determining revenue requirements for the Company and will, therefore, be a cost imposed upon the customers of the Company.

8. Exhibit "D" attached hereto itemizes the bases upon which the foregoing estimate was made. Development of data required by Section 133 of PURPA has necessitated an investment in capitalized items and equipment of approximately eight hundred ten thousand dollars ($810,000.00). Expenses estimated to be incurred in the preparation of each bi-annual report to FERC in the amount of approximately three hundred eighty one thousand dollars ($381,000.00) will, when considered along with the fixed costs on investment, total the eight hundred sixty eight thousand dollars ($868,000.00) referred to in the previous paragraph.

9. The impact of the requirements of Section 133 is to impose an additional financial burden upon the rate payers of Mississippi Power & Light Company, a segment of the Nation's society who, on average, have the lowest per capita income according to published surveys and who have likely experienced the greatest proportional increase in utility costs because of restrictions and curtailment in the use of natural gas as boiler fuel and the substitution therefor of fuel oil in a rapidly escalating world market.

10. Section 290.104 of said Final Regulations (September 28, 1979, p. 8) prohibits including in the wholesale rates of the Mississippi Power & Light Company any portion of the costs of complying with said Final Regulations (as to providing information under 16 U.S.C. Section 2643); thereby imposing such costs on its retail customers and directly affecting the retail rate structure of the Mississippi Power & Light Company, which has heretofore been exclusively within the jurisdiction of the Mississippi Public Service Commission.

11. That, in addition to said Regulations issued by the Federal Energy Regulatory Commission, Exhibits "A", "B" and "C" hereto, the Federal Energy Regulatory Commission and the Economic Regulatory Administration of the Department of Energy have issued numerous "Guidelines" and Orders construing and imple-

menting PURPA, and directly affecting the Mississippi Public Service Commission and the Mississippi Power & Light Company, true copies of the most relevant of which are hereto annexed and made a part hereof as Exhibits "E", "F", "G", "H" and "I".

12. That the information and data base required by PURPA to be furnished from the Mississippi Power & Light Company and other covered electric utilities is, in my opinion, essential for the carrying out and enforcement of the regulatory scheme contemplated by PURPA.

/s/ J. W. Schimpf
J. W. SCHIMPF

Sworn to and subscribed before me, this the 6th day of May, 1980.

/s/ Joshua Green
Notary Public

My Commission Expires: October 18, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Civil Action No. J79-0212(C)

THE STATE OF MISSISSIPPI, ET AL., PLAINTIFFS

and

MISSISSIPPI POWER & LIGHT COMPANY,
PLAINTIFF-INTERVENOR

v.

FEDERAL ENERGY REGULATORY COMMISSION, and
CHARLES W. DUNCAN, JR., Secretary of Energy,
DEFENDANTS

AMENDED RESPONSE TO MISSISSIPPI POWER AND LIGHT COMPANY'S FIRST SET OF INTERROGATORIES TO CHARLES W. DUNCAN, JR. SECRETARY OF ENERGY

Subject to the General Objections set forth in Secretary Duncan's response to plaintiff-intervenor Mississippi Power and Light Company's First Set of Interrogatories, Secretary Duncan amends his response to interrogatories 11-15 as follows:

INTERROGATORY NO. 11:

List the States in which you have intervened in regulatory proceedings for the purpose of enforcing PURPA, and state:

ANSWER TO INTERROGATORY NO. 11:

DOE does not "enforce" PURPA. As of this date, DOE has participated and submitted testimony in State Commission proceedings in *Connecticut*, *Delaware*, and *Maryland*. DOE has also participated and submitted testimony before the *City of Los Angeles Department of Water and Power*. DOE has filed Notice of intervention in State Commission proceedings in *Virginia*, the *District of Columbia*, *Louisiana*, *Arizona*, *New Mexico*, and *Missouri* for the purpose of participating in those proceedings.

INTERROGATORY NO. 12:

The number of witnesses, consultants and attorneys respectively participating in each of these on your behalf; and

ANSWER TO INTERROGATORY NO. 12:

In the *Delaware* proceeding, DOE utilized one staff witness, one consultant, and one attorney. In the *Maryland* proceeding, DOE utilized one staff witness and one attorney. In the *Los Angeles Department of Water and Power* proceeding, DOE utilized one staff witness, one consultant, and one attorney.

INTERROGATORY NO. 13:

The approximate cost of such participation in each proceeding; and

ANSWER TO INTERROGATORY NO. 13:

As of this date, only the *Connecticut* and *Maryland* proceedings have been completed for which the DOE has spent $70,000 and $11,000 respectively for its consultants. The proceedings in *Delaware* and *Los Angeles* are not complete as of this date. Thus far, DOE has spent $65,-

000 and $35,000 respectively for consultants in these proceedings. Since no other proceeding has been completed, no approximation of cost can be made at this time. DOE does not maintain records of the cost of its staff time associated with the numerous projects, activities and responsibilities assigned and undertaken. Therefore, no other approximation of cost attributable to DOE staff can be made.

INTERROGATORY NO. 14:

The approximate time spent by you during each such hearing in making your presentation or case; and

ANSWER TO INTERROGATORY NO. 14:

In the *Delaware* proceeding, the DOE staff witness and consultant were not required to testify as a result of pending stipulation among the parties of record. In the *Maryland* proceeding, the DOE staff witness testified during a two-day period for approximately seven hours. In the *Los Angeles Department of Water and Power* proceeding, the DOE staff witness testified during a three-day period for approximately five hours. In the *Connecticut* proceeding, the DOE staff witness testified during a three-day period for approximately twenty-three hours. The DOE consultant testified for approximately sixteen hours.

Since DOE does not maintain records of its staff time associated with the numerous projects, activities, and responsibilities assigned and undertaken, no approximation of time can be made concerning the amount of time expended by staff members in preparation for any particular proceeding or presentation.

INTERROGATORY NO. 15:

The amount of money or other assistance given or to be granted by you to the State Regulatory Agency involved in each such proceedings (sic); and

ANSWER TO INTERROGATORY NO. 15:

The following amounts have or will be awarded to the respective State Regulatory Authorities: *Connecticut* $200,000 PURPA Grant, $105,000 Innovative Rate Cooperative Agreement, $325,000 ECPA Pilot Grant for a total of $630,000; *Delaware*, $167,600 PURPA Grant; *Maryland* $200,000 PURPA Grant; *Virginia* $200,000 PURPA Grant, $500,000 Innovative Rate Cooperative Agreement for a total of $700,000; *Arizona* $150,000 PURPA Grant, $133,000 Innovative Rate Cooperative Agreement for a total of $283,000; *New Mexico* $200,000 PURPA Grant, $72,000 Innovative Rate Cooperative Agreement for a total of $272,000; *Missouri* $179,000 PURPA Grant; and the *District of Columbia* $190,600 PURPA Grant.

None of these grants or cooperative agreements are tied to DOE participation in State PURPA proceedings.

I declare under penalty of perjury that the foregoing responses provided on behalf of Secretary Duncan are true and correct.

/s/ Howard Perry
HOWARD PERRY
Director
Division of Utility Regulatory Assistance
Economic Regulatory Administration
Department of Energy

/s/ Carl H. Kaplan
CARL H. KAPLAN
Deputy Director
Division of Regulatory Proceedings
Economic Regulatory Administration
Department of Energy

The objections to Mississippi Power & Light Company's Interrogatories are made by counsel for Secretary Duncan.

Respectfully submitted,

ALICE DANIEL
Assistant Attorney General

ROBERT E. HAUBERG
United States Attorney

L. A. SMITH, III
Assistant United States Attorney

/s/ C. Max Vassanelli
C. MAX VASSANELLI

/s/ Paul A. Gaukler
PAUL A. GAUKLER

/s/ Dina R. Lassow PAG
DINA R. LASSOW

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BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C.

Docket No. RM79-55

SMALL POWER PRODUCTION AND COGENERATION—
RATES AND EXEMPTIONS

COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners (NARUC) hereby submits its comments in the above-captioned proceeding.

NATURE OF THE PROCEEDING

Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA or the Act) [Public Law 95-617, 92 Stat. 3117] requires the Federal Energy Regulatory Commission (FERC) to prescribe regulations necessary to encourage electrical cogeneration and small power production. Under PURPA, these regulations shall require electric utilities to offer to buy electricity from and sell electricity to qualifying cogeneration facilities and qualifying small power production facilities. Section 210(f) of PURPA provides that these regulations shall be implemented one year after they are prescribed by State regulatory authorities for each electric utility over which the State authorities have regulatory jurisdiction.

As an initial step in the rulemaking process, FERC issued for public comment a staff paper discussing FERC's responsibilities under Section 210 [44 Fed. Reg.

38863-38872 (July 3, 1979)]. Among its recommendations, the FERC staff concluded that FERC should "promulgate broad general rules in the nature of guidelines, leaving flexibility for the States to experiment and accommodate local circumstances . . ." 44 Fed. Reg. 33871.

After reviewing public comment on the staff paper, FERC issued a Notice of Proposed Rulemaking (NPRM) in this docket containing proposed regulations to implement Section 210 of PURPA [44 Fed. Reg. 61190-61205 (October 24, 1979)]. These comments of the NARUC are in response to the NPRM.

INTEREST OF THE NARUC

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States and the governmental agencies of the District of Columbia, Guam, Puerto Rico and the Virgin Islands, engaged in the regulation of utilities and carriers. The mission of the NARUC is to serve the consumer interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulation electric utility companies within their respective borders. As such, they have the obligation to assure the establishment of such electric utility services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable.

As noted in the NPRM, the NARUC has been an active participant in this docket [44 Fed. Reg. 61995]. On August 1, 1979, the NARUC filed its comments on the FERC staff paper supporting the recommendation that the FERC issue regulations which ensure sufficient flexibility to the State regulatory authorities responsible for their implementation. In the interest of efficient regulation of electric utilities, the NARUC deems it nec-

essary to further express its position on the issues raised in this docket.

COMMENTS

As stated in our comments on the staff paper, the NARUC strongly supports the delegation of authority to State regulatory commissions to implement Section 210 of PURPA. Although this delegation is required by Section 210(f) of the Act, we believe that the proposed regulations issued by the FERC reflect the letter and spirit of the Act, and in general, will lead to the kind of State/Federal cooperation that Congress envisioned when it enacted Section 210. Therefore, with the specific exceptions and recommendations noted below, we support the proposed regulations, with the belief that they represent a strong foundation for the encouragement of cogeneration and small power production.

Section 292.103—Availability of electric utility system cost data. Although the proposed regulations in general provide the necessary State flexibility recommended by the authors of the staff report, we suggest that Section 292.103(b) be amended to grant State Commissions the discretion to prescribe the cost data to be filed by regulated utilities, and the manner in which this data is presented to the public. As currently drafted, this proposed section would prescribe the specific data to be filed by the utilities with the State commissions and the specific format by which this data is made available to potential cogenerators and small power producers. Although some States may choose to utilize the requirements of proposed Section 292.103(b), we recommend that a State commission be given the discretion to 1) require its regulated utilities to provide additional data beyond that specified in the proposed regulation, and 2) present energy and capacity cost information in a different format, if the commission believes that the encouragement of cogeneration and small power production requires such changes.

As the staff paper noted, the need to accommodate local circumstances coupled with the enormous variety of possible arrangements that might be made between qualifying facilities and regulated utilities necessitates a large measure of State flexibility. As the State commissions gain experience in this area, the ability to fashion innovative solutions to problems arising between prospective qualifying facilities and utilities will become increasingly important to the success of the Section 210 initiative. The NARUC can assure the FERC that State regulatory commissions will discharge their duties under Section 210 of PURPA in a responsible manner, and we therefore believe that an amendment to proposed section 292.103 to provide greater flexibility in the collection and publication of utility cost data is warranted.

Section 292.105—Rates for purchases. The NARUC supports the provision of proposed section 292.105(a)(3), required by section 210(d) of the Act, which establishes rates for purchases by a utility from a qualifying facility based on the utility's full avoided cost (energy and capacity). In addition, we support the provisions of proposed section 292.105(d) with the understanding that the list of factors to be considered by a State commission contained therein is not an exclusive litany of issues to be determined, but may be augmented by other factors whose considerations the State commission determines to be in the public interest. Finally, we support the provisions of section 292.105(e) which grant State regulatory commissions the authority to determine periods wherein purchases by regulated utilities from qualifying facilities are not economic, and therefore not permissible.

Section 292.107—Simultaneous purchase and sale. The NARUC supports this section which permits the simultaneous buy and sell arrangements between electric utilities and new qualifying facilities (i.e., facilities whose construction is commenced after final regulations are issued by FERC). Although we do not recommend amending proposed section 292.107 at this time, we suggest

that in the future, after the State commissions and FERC become experienced in the implementation of the regulations, FERC should consider amending this section to grant the State commissions the authority to permit existing facilities to enter into buy and sell agreements upon a showing that such agreements are in the public interest.

Section 292.108—Costs of interconnection. The NARUC supports the provisions of section 292.108(b) which would require qualifying facilities providing power to a utility to reimburse the utility for interconnection costs, limited to the net increased costs imposed on the utility; and section 292.108(c), which would require non-discriminatory interconnection costs for sales from a utility to a qualifying facility.

Section 292.110—Standards for operating reliability. We strongly support the provisions of this section which permit State regulatory authorities to prescribe reasonable standards to ensure system safety and reliability in interconnected operations between regulated utilities and qualifying facilities. The need to ensure a safety and reliability for the benefit of all utility consumers makes State commission authority to prescribe such standards imperative.

Subpart C—Implementation. As noted at the outset of these comments, the NARUC strongly supports proposed section 292.301 which delegates implementation of the regulations to State regulatory authorities. Although this delegation is prescribed by section 210(f) of PURPA, we particularly support the provisions in the proposed regulations which grant the States broad flexibility in determining the procedures by which the regulations are implemented.

In addition, we support proposed section 292.303 which permits the State commissions to apply for waivers from any of the requirements of Subpart A of the regulations. We hope that section 292.103 of the final regulations will reflect our suggestion noted above, obviating

the need for the limitation on waivers of that section contained in proposed section 292.303(a).

In summary, we believe that the FERC should be commended on the proposed regulations. With the inclusion of the amendments that we have recommended, particularly with regard to section 292.103, we believe that these regulations can provide the basis for a strong program encouraging cogeneration and small power production in all areas of the country, under the local supervision of the State regulatory commissions.

Respectfully submitted,

PAUL RODGERS
General Counsel

CHARLES D. GRAY
Assistant General Counsel

PAMELA F. MELTON
Deputy Assistant General Counsel

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BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RM79-55

STAFF PAPER DISCUSSING COMMISSION RESPONSIBILITIES TO ESTABLISH RULES REGARDING RATES AND EXEMPTIONS FOR QUALIFYING COGENERATION AND SMALL POWER PRODUCTION FACILITIES PURSUANT TO SECTION 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978

COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners (NARUC) hereby submits its comments in the above-captioned proceeding.*

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* The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States and the governmental agencies of the District of Columbia, Guam, Puerto Rico and the Virgin Islands, engaged in the regulation of utilities and carriers. The mission of the NARUC is to serve the consumer interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating electric utility companies within their respective borders. As such, they have the obligation to assure the establishment of such electric utility services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable. In furtherance of these objectives and in the interest of efficient regulation of gas and electric utilities, the NARUC deems it necessary to express its position concerning FERC implementation of Section 210 of PURPA.

NATURE OF THE PROCEEDINGS

Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) (Public Law 95-617, 92 Stat. 3117) requires the Federal Energy Regulatory Commission (FERC) to prescribe, by November 8, 1979, rules necessary to encourage electrical cogeneration and small power production. These rules must require electric utilities to offer to buy electric energy from and sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities. In addition, Section 210 of PURPA requires that FERC consult with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities prior to prescribing final regulations. Finally, Section 210(f) provides that these regulations shall be implemented one year after they are prescribed, by State regulatory authorities for each electric utility over which they have authority.

As an initial step in the process of prescribing regulations, FERC has issued for comment a staff paper discussing FERC's responsibilities under Section 210 of PURPA. 44 Fed. Reg. 38863-38872 (July 3, 1979). These comments of the NARUC are in response to the staff paper.

COMMENTS

The NARUC strongly supports the recommendations and conclusions contained in the staff paper concerning the role of State regulatory commissions in the implementation of FERC-prescribed regulations regarding cogeneration and small power production under Section 210 of PURPA. The NARUC particularly joins in the conclusion of the staff paper at 44 Fed. Reg. 33871:

> As this entire discussion of pricing and interconnection indicates, the variety of arrangements that might be made between QF's [qualifying facilities] and utilities is enormous. Therefore, we would recommend that the Commission promulgate broad gen-

eral rules in the nature of guidelines, leaving flexibility for the States to experiment and accommodate local circumstances and leaving room for the parties to negotiate the particular terms and conditions of their arrangements. Under this approach, the States and the Commission would function more as arbitrators of disputes the parties can not resolve than as traditional regulators. This approach is, in our view, practically unavoidable with regard to the sales by QF's to utilities. On the other hand, as noted above, the sale from utilities to QF's is in most instances the type of transaction the States now regulate, and continuation of this regulation without substantial change is certainly a real option.

Finally, we must observe that the arbitration of disputes approach espoused above is not appropriate where a utility is participating in the ownership or even the operation of a QF. We would recommend that the specific terms of such arrangements be scrutinized by the States to ensure that the pricing or other provisions are not unduly discriminatory or beneficial.

In particular, we believe that the recommendation that FERC prescribe broad guidelines which permit flexibility for State experimentation in light of local circumstances is warranted by legal, policy and practical considerations.

Section 210(f) of PURPA contemplates a regulatory scheme for cogenerators and small power producers which relies on effective State implementation of Federally promulgated regulations. Furthermore, as noted, Section 210(a) requires that FERC consult with representatives of State regulatory authorities prior to prescribing these regulations. When perceived in its entirety, Section 210 establishes a system predicated on State/Federal cooperation, with great responsibility left to the States to effectively implement a legal structure which encourages cogeneration and small power production. If this goal is

to be reached, the States must be given a broad measure of discretion, and not be bound by rigid, overly prescriptive regulations. Neither the language of Section 210, nor its legislative history require FERC to promulgate prescriptive regulations, and we believe to do so would be inappropriate, frustrating the purpose for which Section 210 was enacted.

The NARUC recognizes that these initiatives may very well be viewed with suspicion by the regulated utilities required to sell electrical power to and purchase electric power from cogenerators and small power producers. We believe that these utilities, which are already familiar with State commission policies and procedures, will be much more likely to respond to State implementation which is capable of confronting local and Statewide conditions in a flexible manner. Questions regarding the interconnection of facilities and the reliability of service, for example, are best addressed at the State level under broad State commission supervision and authority. If the goal of optimal use of cogeneration and small power production is to be reached, utility cooperation must be encouraged through flexible State implementation.

Practical considerations also support the need to grant broad discretion to the State commission. As the Staff report notes, "the variety of arrangements that might be made between QF's (qualifying facilities) and utilities is enormous." In addition, as new technologies produce new methods of power production, this "variety or arrangements" will likely become even more enormous. By prescribing flexible rules which delegate broad authority to the States. FERC will be able to ensure that the expanding universe of cogeneration and small power production will be addressed expeditiously and effectively at the local level, where the power is actually produced.

Finally, the NARUC supports the conclusion of the staff paper that FERC look to the States when considering the effect of these regulations upon the environment. We believe that the States in general, and State regula-

tory commissions in particular, can provide a wealth of information in this regard.

Respectfully submitted,

PAUL RODGERS
General Counsel

WILLIAM R. NUSBAUM
Assistant General Counsel

CHARLES D. GRAY
Deputy Assistant General Counsel
National Association of
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August 1, 1979

AFFIDAVIT OF JOSEPH H. FLOOD

STATE OF TEXAS)

COUNTY OF TARRANT)

JOSEPH H. FLOOD, have been duly sworn, deposes and says:

1. I am chief of the Interconnection and Systems Analysis Branch of the Fort Worth Regional Office of the Federal Energy Regulatory Commission and have been employed by the Commission or its predecessor, the Federal Power Commission, since 1965. In my current position I am supervisor of the electric section of this office, which covers the south central section of the country, including the western half of Mississippi. I am an electrical engineer with 40 years experience, having graduated from Texas A & M College with a BS/EE degree.

2. Regulations of the Federal Energy Regulatory Commission require persons or entities operating facilities for the generation, transmission or distribution of electric energy to file with the Energy Information Administration of the Department of Energy, Power System Statements (18 C.F.R. § 141.41, *et seq.*). These reports contain data or energy transfers and interconnections with other electric utility companies. Based on an examination of those forms relevant to operations of utilities in the Western half of Mississippi, there are no isolated systems in that part of the State. Each of the utilities operating there is interconnected with other utilities in such a manner that it is part of the interstate power grid.

JOSEPH H. FLOOD

DATE: May 21, 1980.

Subscribed and sworn to before me this 21st day of May, 1980.

DORIS D. SHETTER
Notary Public

AFFIDAVIT OF JOHN SNELLGROVE

STATE OF GEORGIA)

COUNTY OF FULTON)

JOHN SNELLGROVE, being duly sworn, deposes and says:

1. I am chief of the Interconnection and Systems Analysis Branch of the Atlanta Office of the Federal Energy Regulatory Commission and as such am supervisor of the electric staff in that office of the Commission which covers the southeastern part of the country, including the eastern half of Mississippi. I have worked for the Commission or its predecessor, the Federal Power Commission, for nine years. Prior to that time I worked for twenty years for Duke Power Company. I have a BS/EE degree in electrical engineering from the University of South Carolina.

2. In preparing this affidavit, I have examined copies of the Energy Power System Statements required to be filed under Commission Regulation 141.51, *et seq.* (18 C.F.R. § 141.51, *et seq.*) relevant to electric utility activities of companies operating in the eastern half of Mississippi. Based on the information contained in those reports, there are no isolated systems operating in that part of Mississippi; each of the utilities is interconnected with other utilities in such a manner that it is part of the interstate power grid.

JOHN SNELLGROVE

DATE: May 22, 1980

Subscribed and sworn to before me this 22nd day of May, 1980.

DOROTHY P. BRYANT
Notary Public

SUPREME COURT OF THE UNITED STATES

No. 80-1749

FEDERAL ENERGY REGULATORY COMMISSION, ET AL., APPELLANTS

v.

MISSISSIPPI, ET AL.

Appeal from the United States District Court for the Southern District of Mississippi

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

June 15, 1981

★ U. S. GOVERNMENT PRINTING OFFICE: 1981 381331 555